Supreme Court, U.S.
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No. 02-___

IN THE

Supreme Court of the United States

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 1445,
Petitioner,

v.

POLAND SPRING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Circuit's *S.D. Warren/Georgia-Pacific* line of cases—pursuant to which that court vacates labor arbitration awards on the ground that the arbitrator has misread the labor contract where, on the court's reading, the contract's literal language leaves no room for an arbitral reading—is contrary to this Court's cases limiting judicial review of arbitration awards, which hold that "a court should not reject an award on the ground that the arbitrator has misread the contract," *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

United Food & Commercial Workers International Union, AFL-CIO-CLC, Local 1445, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit in *Poland Spring Corp. v. United Food & Commercial Workers International Union, AFL-CIO-CLC, Local 1445*, First Circuit No. 02-1064 (Dec. 24, 2002).

OPINIONS BELOW

The opinion of the court of appeals is reported at 314 F.3d 29 and is attached as Appendix A, pp. 1a-25a. The opinion of the district court is reported at 179 F.Supp.2d 1 and is

attached as Appendix B, pp. 26a-28a. The order of the court of appeals denying rehearing is reported at 317 F.2d 350 and is attached as Appendix C, p. 29a. The decision of the arbitrator is unreported and is attached as Appendix D, pp. 32a-48a.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 2002. A timely petition for rehearing was denied on January 22, 2003. On April 14, 2003, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including May 22, 2003. The jurisdiction of this Court in invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargain ing agreement.

STATEMENT OF THE CASE

The instant case arises out of an arbitration pursuant to the grievance-arbitration procedures established by a collective

bargaining agreement in which the arbitrator found that the employer had violated the agreement by discharging an employee and ordered the employer to reinstate the employee with a limited amount of backpay. The employer brought suit to vacate the award, and the court below did vacate the award on the ground that, as the court read the agreement, the award was contrary to the plain contractual language.

1. The collective bargaining agreement between the Poland Spring Corporation and United Food & Commercial Workers International Union, AFL-CIO-CLC, Local 1445, contains a grievance-arbitration procedure for the resolution of "differences [that] arise . . . between the Employer and the Union as to the meaning or application of the provisions of the Agreement." Pet. App. 51a. In its substantive terms relevant, here the agreement provides that "[d]iscipline and discharge shall only occur for just cause," and then sets out a listing of twenty-one types of employee conduct that would constitute "just cause for discharge." *Id.* at 50a-51a. Among the twenty-one types of conduct—which range from "loafing" and "lack of cleanliness" to "taking a bribe" and "fighting"—is "insubordination." *Id.*

These provisions of the collective bargaining agreement came into play when Poland Spring discharged Leo Beaupre.

"The incident which lead to Beaupre's termination occurred on the night shift" when "a group of employees got together and began playfully teasing [Beaupre's supervisor Mike] Aresnault." Pet. App. 2a. Although "[t]he employees teased Aresnault rather crudely about his recent promotion," he "did not appear offended at first" and "actually joined in the ribbing." *Id.* "Predictably, this spirit of jocularity did not last," and "Arsenault suddenly 'became unglued,' stated 'that will be enough,' and ordered everyone back to work." *Id.*

"When the banter ended, Arsenault directed Beaupre and another worker to go into the filler room and help clean up

stray bottles that were on the floor." Pet. App. 2a. "Beaupre explained to Arsenault that due to an asthmatic condition, he could not work in the filler room," and Arsenault instead ordered Beaupre to "clean bottles out from underneath the accumulation table," a "task [that] would require Beaupre to crawl under the accumulation table, which stands on legs only a few feet off the floor." *Id.* at 3a.

"Beaupre refused to follow this directive from Arsenault, telling Arsenault that his 'crawling days [were] over; it's hard for me to crawl into bed [and] hard for me to crawl out of bed.'" Pet. App. 3a. Beaupre continued to refuse to comply with the order, although Arsenault warned him that he could be discharged for insubordination. *Id.* And, Beaupre once again refused to comply when Arsenault enlisted another supervisor to join in ordering Beaupre to "pick up the bottles as directed." *Id.*

In the end, the Company did discharge Beaupre for refusing to comply with the order. Pet. App. 4a.

When the validity of the discharge could not be resolved through the grievance procedure, the Union and the Company agreed to submit the following two issues to the arbitrator for resolution:

> "Did the Company violate the contract by discharging Leo Beaupre?
>
> "If so, what shall be the remedy?" Pet. App. 33a.

The arbitrator answered these two questions as follows:

> "Because the supervisor's misbehavior contributed to the initial breakdown in the proper relationship between supervisor and employee, the Company violated the contract by discharging Leo Beaupre as a consequence of the February 5 incident.
>
> "The Company shall reduce the grievant's discharge to a suspension of two weeks without pay. The Company

> shall reinstate the grievant and make him whole for pay and benefits he lost due to the termination of his employment without just cause." *Id.* at 32a.

In rejecting the Company's argument that "Article 32 . . . clearly and unambiguously states that . . . an act of insubordination . . . constitutes just cause for termination," Pet. App. 46a, the arbitrator explained:

> "That language may well establish that in clear, straightforward cases of insubordination, without mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination. However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination. On the contrary, where significant, mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified. This more complex fact situation must be considered under the general, just cause standard set forth in article 32, giving due weight to the fact that the parties have agreed that a pure case of insubordination, without mitigating considerations, would provide just cause to terminate." *Id.* at 47a.

2. Poland Spring brought suit under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to vacate the award. The district court did vacate the award "[u]nder the authority of *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 845 F.2d 3, 7-8 (1st Cir. 1988), and *Georgia-Pacific Corp. v Local 27*, 864 F.2d 940, 944-45 (1st Cir. 1988)." Pet. App. 27a-28a. The First Circuit, on the authority of these two precedents, affirmed the vacation of the award, with Judge Lynch dissenting.

Judge Torruella, writing for the majority, explained that the First Circuit's *S.D. Warren/Georgia-Pacific* precedents establish the general rule that, "[i]f the language of an

agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement." Pet. App. 8a. And, the particular application of this rule that the court below found to govern this case was "that once an arbitrator finds that an employee has committed an act specifically listed in the collective bargaining agreement as providing just cause for termination, the arbitrator is not free to fashion a separate remedy apart from the one provided by the parties' agreement." *Id.* at 10a.

Separately concurring, Chief Judge Boudin observed that "[i]n [*Paperworkers v.*] *Misco*, 484 U.S. [29,] at 41-42 [(1987)], the Court said that an arbitrator could impose a lesser remedy than discharge, arguably in a situation not too far from our own." Pet. App. 19a. And, Judge Boudin added that "[i]f our own case were before us as the first one to arise after *Misco*, its proper disposition would present a difficult and interesting issue." *Id.* at 20a. However, he concluded that "[t]his debatable issue has been resolved in this circuit," because "*S.D. Warren* was decided after *Misco*—indeed, on remand after an earlier *S.D. Warren* decision had been vacated by the Supreme Court for reconsideration in light of *Misco*." *Id.* at 18a & 20a.

Dissenting from the First Circuit's decision, Judge Lynch "agree[d] that the district court could reasonably have concluded that it was bound to reverse the arbitrator under *Georgia-Pacific* or *S.D. Warren*." Pet. App. 21a (citations omitted). But she went on to state that it was "time for this court to disavow both of those cases as inconsistent with Supreme Court precedent." *Id.* at 25a. *See id.* at 22a-23a discussing *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987), *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000), and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

The court of appeals, with Judge Lynch dissenting and Judge Lipez recusing himself, denied the Union's petition for rehearing. Pet. App. 29a.

REASONS FOR GRANTING THE PETITION

Like the Ninth Circuit's decision in the *Garvey v. Baseball Players* litigation, the First Circuit decision in this case "conflicts with [this Court's] cases limiting review of an arbitrator's award entered pursuant to an agreement between an employer and a labor organization." *Major League Baseball Players' Ass'n v. Garvey*, 532 U.S. 504, 505 (2001), granting certiorari and reversing per curiam *Garvey v. Major League Baseball Players' Ass'n*, 243 F.3d 547 (9th Cir. 2000)(table). *See Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000).

In *Garvey*, the Ninth Circuit proceeded in plain disregard of one of the fundamental limits on the judicial review of labor arbitration awards "by overturning the arbitrator's decision because [the court] disagreed with the arbitrator's factual findings" and "by resolving the merits of the parties' dispute on the basis of its own factual determinations." 532 U.S. at 510-511.

In the decisional line culminating in the instant case, the First Circuit has proceeded in an equally plain disregard of the other fundamental limit on the judicial review of labor arbitration awards by overturning a labor arbitration decision because the court disagrees with the arbitrator's view of the meaning of the labor contract and by resolving the merits of the parties' dispute on the basis of the court's own view of the contract's meaning.

The First Circuit's deviance from the limited review of labor arbitration awards dictated by this Court's cases has the most serious adverse effect on the labor relations system for

the voluntary settlement of workplace disputes promoted by the Labor Management Relations Act §§ 203(d) and 301(a). As this Court has explained, expansive judicial review of the kind the First Circuit practices "greatly undermine[s]" the LMRA system for the "speedy resolution of grievances by private mechanisms" and the "on-going process of collective bargaining." *Misco*, 484 U.S. at 38. And, as Circuit Judge Lynch observed, this adverse effect of the decision below is made all the more serious by the First Circuit's "intensifi[cation of] a circuit split" on a recurring issue with the courts of appeals that practice the limited review of labor arbitration awards dictated by this Court. Pet. App. 30a.

These precise parallels, we submit, make it manifest that here, as in *Baseball Players v. Garvey*, the Court should both grant certiorari and reverse the First Circuit's decision in order to maintain the integrity of the LMRA § 301 law governing the judicial review of labor arbitration awards and to assure that the § 301 law in this regard is, as Congress intended, uniform and consistent nationwide.

1. The salient point made by this Court's "cases limiting review of an arbitrator's award," *Garvey*, 532 U.S. at 505, is succinctly stated in *Misco*:

> "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. *** The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. *** [T]he arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its

> essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." 484 U.S. at 37-38.

Accord Garvey, 532 U.S. at 509 ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision . . . misinterprets the parties' agreement."); *Eastern Associated Coal*, 531 U.S. at 62 ("we must treat the arbitrator's award as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract's words").

The upshot—as Seventh Circuit Judge Posner has so aptly put it—is that

> "the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive." *Hill v. Norfolk & Western Ry. Co.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987) (citations omitted).

Accord Utility Workers Union of America, Local 246 v. NLRB, 39 F.3d 1210, 1216 (D.C. Cir. 1994) ("[A] federal district court presiding over a § 301 proceeding seeking enforcement of an arbitrator's award must give the award the greatest deference imaginable—the award must be enforced so long as the arbitrator purports to be interpreting the contract."); *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) ("Since the labor arbitrator is designed to function in essence as the parties' surrogate, he cannot 'misinterpret' a collective bargaining

agreement . . ., 'he is speaking for the parties, and his award *is* their contract.'").

In contrast, the First Circuit does not begin and end by asking the single dispositive question of whether the arbitrator's award rests on the arbitrator's "interpretation of the contract." Instead, the First Circuit proceeds by first asking whether the arbitrator had authority to interpret the contract and then answering that question by undertaking an independent judicial interpretation of the contract to ascertain whether its language is susceptible to only a single meaning—which the First Circuit regards as negating the arbitrator's authority to interpret the contract—or is susceptible to different meanings—which does afford the arbitrator authority to interpret the contract.

On the First Circuit's approach, the rule that a court "cannot vacate the award because the arbitrator misreads the contract" applies *only* "where there is room [for the arbitrator] to do so [*viz.*, to read the contract]." *Georgia-Pacific Corp. v Local 27*, 864 F.2d 940, 944 (1st Cir. 1988). According to the First Circuit, there is "room" for the arbitrator to read—and perforce to possibly misread—the labor contract, only where *the court* concludes that "the language of the underlying contract, taken in context and with due regard for the surrounding circumstances, is fairly susceptible to differing meanings." *Exxon Corp v. Esso Workers Union*, 118 F.3d 841, 845 (1st Cir. 1997), quoting *El Dorado Technical Services v. Union General De Trabajadores*, 961 F.2d 317, 320 (1st Cir. 1992). But, says the First Circuit, "[a]n arbitrator . . . may *not* . . . interpret a clause or provision when [the court finds that] its language is clear, unequivocal and unambiguous." *Strathmore Paper Co. v. Paperworkers*, 900 F.2d 423, 426 (1st Cir. 1990) (emphasis added).

2. The extent to which the First Circuit has usurped the arbitrator's contract interpretation authority is vividly illustrated by the instant case.

Following the *S.D. Warren/Georgia-Pacific* approach, the First Circuit majority concluded that "the plain language of Articles 32 and 33 left nothing to the arbitrator's discretion except to determine whether or not Beaupre's conduct was insubordination." Pet. App. 11a. On the court's reading of these clauses, "once an arbitrator finds that an employee has committed an act specifically listed in the collective bargaining agreement as providing just cause for termination, the arbitrator is not free to fashion a separate remedy apart from the one provided by the parties." *Id.* at 10a. For that reason, said the court below, the arbitrator here erred in "distinguish[ing] straightforward insubordination from insubordination with mitigating circumstances." *Id.* at 6a. "Upon reaching the conclusion that Beaupre's conduct was insubordinate, the arbitrator was 'barred from further inquiry because such additional probing constituted "ignoring the plain language of the contract."'" *Id.* 10a, quoting *Georgia-Pacific*, 864 F.2d at 945 (quoting *Misco*, 484 U.S. at 38).

Significantly, while the First Circuit majority stated that the arbitrator's interpretation of the collective bargaining agreement must be rejected as precluded by the "plain language" of Article 32, the majority also acknowledged that, in other—albeit closely related—respects, Article 32 does not in truth have the simple "plain language" meaning the court assigned to it in overturning the arbitrator's award.

The core requirement of Article 32 is that "[d]iscipline shall only occur for just cause." Pet. App. 50a. The clause goes on to state that "[t]he parties agree that just cause for discharge shall include, but not be limited to, the following" 21 types of employee conduct, including "insubordination." *Id.* The First Circuit majority recognized, however, that "minor" or "trivial" instances of insubordination would *not* constitute "just cause" for discharge, even though, as the court stressed in rejecting the arbitrator's decision, "insubordination"—without any such qualification—is one of

the 21 types of employee conduct listed in Article 32. Pet. App. 14a & 17a.[1]

Thus, the First Circuit majority at one and the same time opined that the plain language of Article 32 does *not* make "minor" or "trivial" instances of the types of employee conduct listed there "just cause" for discharge *per se* but insisted that the plain language *does* unequivocally and unambiguously make instances of the listed types of conduct with "mitigating circumstances" just cause for discharge *per se*. Purely as a matter of contract interpretation, it is impossible to see why the language does admit of a "trivial" or "minor" instances limitation but precludes a "mitigating circumstances" limitation. Indeed, as Judge Boudin observed, the two types of limitations tend to merge as "lack of . . . severity . . . could be viewed as a mitigating consideration." Pet. App. 17a.

As the foregoing indicates, and as Judge Boudin appreciated, it is unlikely in the extreme that Article 32 plainly and unequivocally stands for the proposition that the employer has just cause *per se* to discharge an employee whose "lack of cleanliness" was directly caused by performing his job, even if the employee were more than "trivial[ly]"

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[1] Chief Judge Boudin elaborated on this point in his concurring opinion:

> "Here, the arbitrator could permissibly have read the contract to mean that some acts of disobedience constitute 'insubordination' within the meaning of the contract and that other, less severe acts—although literally disobedience—do not. 'Insubordination' is not defined in the contract nor is it self-defining and, reading the provision in context, a judge (and even more surely an arbitrator) would be likely to exclude trivial disobedience, such as a refusal to light the supervisor's cigarette. Consider that lack of cleanliness is also listed as a basis for discharge under this contract, but certainly a smudge on a nose would not qualify for discharge. So, taking account of the severity of the disobedience is, within broad limits, surely a part of the arbitrator's authority." Pet. App. 16a-17a.

unclean, or that the employer has just cause *per se* to discharge an employee who is "reading on duty" while he stands by without an assignment during an equipment breakdown. Each of these cases involves a non-trivial instance of employee conduct listed in Article 32, but the surrounding circumstances make the conduct transparently less than "just cause" for discharge.[2]

The sum of this matter of the arbitrator's contract interpretation authority is, as the Seventh Circuit has recognized, that "contracts have implied as well as express terms" and it follows that "the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms." *Ethyl Corp.*, 768 F.2d at 186. As the Seventh Circuit added in this regard, "there is no rule that an arbitrator, in order to find an implied condition, must first find the language of the contract to be ambiguous;" even where "a literal reading of the contract . . . would preclude the

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[2] There is, moreover, no difficulty in thinking of hypotheticals that would "test[] the company's commitment to literal interpretation." *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985). Consider, for example, the issue of "intoxicants," which is dealt with twice in Article 32:

> "3. Reporting for duty under the influence of intoxicants or drugs;
>
> "4. Bringing intoxicants or drugs into the operation." Pet. App. 50a.

Read literally, items 3 and 4 would *not* cover an employee who became intoxicated after "reporting for duty" by consuming substances brought "into the operation" by someone else. Nevertheless, these items are obviously intended to cover such conduct. And, an arbitrator who concluded that the care with which the issue of intoxicants was addressed—two separate items, carefully phrased to specify "reporting for duty" as opposed to "being on duty under the influence" and "bringing intoxicants into the operation" as opposed to "possessing" them—indicated an intention to protect from discharge an employee who became intoxicated on the job would be rendering a very foolish—although literal—interpretation of the clause.

implied condition that the arbitrator found," that is not dispositive, because "he [i]s not obliged to read the contract literally." *Id.*

The First Circuit's *S.D. Warren/Georgia-Pacific* approach, by arrogating to the courts the authority to interpret labor contracts literally according to their plain language (as the court reads that language), thus usurps the arbitrator's authority to interpret those contracts according to their "express terms" and their "implied terms." This is contrary to this Court's *Misco/Eastern Associated Coal/Garvey* cases "limiting review of arbitration awards." *Garvey*, 532 U.S. at 510.

3. It is apparent from the face of the award here that the arbitrator did not transgress his contractual interpretation authority by "ignoring the plain language of the contract," Pet. App. 10a, as the First Circuit majority charged, but rather properly exercised that authority and concluded that the literal language of the contract has a narrower meaning than the First Circuit majority attributed to that language.

The arbitrator carefully considered Poland Spring's argument "that Article 32 of the labor agreement clearly and unambiguously states that when an employee commits an act of insubordination, that by definition constitutes just cause for termination" so that "the arbitrator lacks authority to reduce a termination to a lesser level of discipline, once the offense of insubordination has been proven." Pet. App. 46a. The arbitrator did so by acknowledging "[t]hat [the] language [of Article 32] may well establish that in clear, straight-forward cases of insubordination, without mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination." *Id.* at 47a. He then added, "[h]owever, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination." *Id.* He concluded, "[o]n the contrary, where significant, mitigating considerations are

present, the culpability of the employee may be diminished, and summary termination may no longer be justified." *Id.*

Having found that the labor contract does *not* state a *per se* rule justifying termination for insubordination "in the presence of mitigating circumstances," the arbitrator explained that the "more complex fact situation" presented by such circumstances "must be considered under the general, just cause standard set forth in article 32, giving due weight to the fact that the parties have agreed that a pure case of insubordination, without mitigating considerations, would provide just cause to terminate." Pet. App. 47a.

Far from "ignor[ing] the plain language of the contract," the arbitrator endeavored to "give meaning to the language of the agreement" by "construing [and] applying the contract" to the particular dispute brought before him for resolution. *Misco*, 484 U.S. at 38.

So we are not misunderstood, the dispositive point is that under this Court's cases the arbitrator acted within his authority to interpret the contract in reading Article 32 as he did and that, under this Court's *Misco/Eastern Associated Coal/Garvey* cases, the First Circuit had no authority to reject that interpretation in favor of its own literal interpretation; it is *not* that the arbitrator's interpretation is the only right interpretation and that a literal interpretation is an erroneous interpretation.

In *Misco*, the contractual provision at issue—Rule II.1—was similar to Article 32 in that it "list[ed] . . . causes for discharge." 484 U.S. at 32 n. 2. The *Misco* Court recognized that "it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found." 484 U.S. at 41. But, said the *Misco* Court, "[b]efore disposing of the case on the ground that Rule II.1 had been violated and discharge was

therefore proper, the proper course would have been remand to the arbitrator *for a definitive construction of the contract in this respect.*" *Id.* at 42 (emphasis added).

The error of the court below was, thus, *not* in reading Article 32 as a provision that makes the 21 types of employee conduct listed there *per se* grounds for a just cause discharge. Rather, the court's error was in treating that Article as "tak[ing] discretion away from arbitrators," Pet. App. 10a, to rule on whether such conduct constitutes just cause for discharge *per se*, so that an arbitrator who reads the Article differently than the court must be deemed to have "exceeded his authority," *id.* at 12a n. 2.

As *Misco* makes clear, it is the arbitrator, not the courts, who has the authority to "definitive[ly] construe[]" labor contract clauses such as Article 32. 484 U.S. at 42.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1064

POLAND SPRING CORPORATION,
Plaintiff/Appellee,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 1445,
Defendant/Appellant.

December 24, 2002, Decided

OPINION:

TORRUELLA, *Circuit Judge.*

The appellant, United Food and Commercial Workers International Union. AFL-CIO-CLC, Local 1445 ("Union") appeals from the district court's summary judgment vacating an arbitration award that reinstated employee Leo Beaupre and reduced his discharge to a suspension without pay. Appellee is the Poland Spring Corporation ("Poland Spring"), which terminated Beaupre for insubordinate behavior on February 5, 2000. We affirm.

Background Facts

Poland Spring is a bottler of non-carbonated water with bottling facilities in Maine. In 2000, Leo Beaupre worked for Poland Spring as a palletizer operator. A palletizer is a machine that loads cases of bottles onto pallets and wraps the full pallets in plastic for shipping. As a palletizer operator, Beaupre was responsible for placing empty pallets on the

machine, removing loaded pallets, and keeping the area around his machine clean. Since his palletizer was elevated on legs above the floor, this housekeeping task occasionally required him to remove stray bottles from under the machine.

The incident which led to Beaupre's termination occurred on the night shift beginning on February 5, 2000. Beaupre's supervisor that night was Mike Arsenault, a former co-worker of Beaupre's who had recently been promoted to a supervisory role. At some point during the shift, a group of employees got together and began playfully teasing Arsenault. This group included Beaupre. The employees teased Arsenault rather crudely about his recent promotion, stating in starkly graphic terms how he was promoted for providing an imaginative variety of sexual favors to the plant manager, another male.

Arsenault did not appear offended at first. In fact, at some point Arsenault actually joined in the ribbing, pretending to call up the plant manager on his radio to tell the manager that he would be right up to see him. Predictably, this spirit of jocularity did not last. According to Arsenault, the joking ended when the group received a radio call, and Arsenault assigned the employees to various work tasks. Beaupre, in contrast, testified that Arsenault suddenly "became unglued," stated "that will be enough," and ordered everyone back to work.

When the banter ended, Arsenault directed Beaupre and another worker to go into the filler room and help clean up stray bottles that were on the floor. Beaupre explained to Arsenault that due to an asthmatic condition, he could not work in the filler room where elevated levels of ozone could be present. Arsenault responded that if Beaupre could not work in the filler room, he should go clean bottles out from underneath the accumulation table. The accumulation table is a large table where filled bottles coming from the filler operation can accumulate if the palletizer operation is

interrupted. The task would require Beaupre to crawl under the accumulation table, which stands on legs only a few feet off the floor.

Beaupre refused to follow this directive from Arsenault, telling Arsenault that his "crawling days [were] over; it's hard for me to crawl into bed [and] hard for me to crawl out of bed." Arsenault then repeated his directive to Beaupre, but Beaupre continued to refuse to clean out the bottles. According to Arsenault, he then warned Beaupre that his non-compliance would constitute an act of insubordination which could result in Beaupre's termination. Nevertheless, Beaupre again refused to comply with the order.

Arsenault then directed Beaupre to accompany him to a conference room. On the way there Beaupre asked Arsenault whether he was really going to fire Beaupre over a bottle of water, and also asked Arsenault whether that would make him feel like a man. Despite the fact that Arsenault had now made it clear to Beaupre that he could face termination for failure to comply with Arsenault's directives, he refused to clean up the bottles.

While they were walking toward the conference room, Arsenault radioed a more experienced supervisor to join them. Also joining them were two other plant employees who came at Arsenault's request as witnesses. Once again, the supervisors instructed Beaupre to go pick up the bottles as directed, and once again Beaupre refused to perform the assigned work. Beaupre was suspended pending investigation, and sent home.

The following day, the Union filed a grievance, alleging that Arsenault's fraternizing and joking with the plant employees was unprofessional, and that after being the subject of so much teasing, Arsenault retaliated by trying "to embarrass [Beaupre] in front of his peers by making him crawl under a conveyer for one bottle[.]"

At a post-suspension "Step 2" hearing, Beaupre and the Union offered two affirmative defenses explaining Beaupre's refusal to obey a directive. The Union's arguments were rejected, and following the Step 2 grievance meeting, Poland Spring converted Beaupre's suspension to a termination of employment.

The Collective Bargaining Agreement

The Union submitted a grievance pursuant to the collective bargaining agreement then in existence between it and Poland Spring. Article 32 of the agreement is entitled "Discipline and Discharge" and provides in plain language that insubordination "shall" constitute just cause for termination. That Article also provides that a number of offenses may warrant a lower level of discipline prior to discharge. Insubordination, however, is not such an offense. The relevant section of Article 32 provides:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:
>
> . . .
>
> 8. Insubordination
>
> . . .

Under Article 33, the arbitrator's authority is expressly limited to the provisions of the Agreement. Accordingly "the arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement."

The Arbitrator's Award

The factual findings of the arbitrator are substantially those previously discussed. Nevertheless, because the primary issue for our consideration is whether the arbitrator unambiguously

found that Beaupre's February 5 conduct was insubordinate, it is helpful here to reproduce substantial portions of the arbitrator's decision.

His discussion of the termination began:

> There is little doubt in this case that absent some persuasive affirmative defense, [Beaupre] was guilty of the offense of insubordination on the February 5, 2000 night shift. Arsenault repeatedly ordered the grievant to clean out the scrap bottle(s) from under the accumulation table. The grievant repeatedly refused to comply with that directive, even after first Arsenault and then [another supervisor] made it clear to him that he could be terminated for so refusing.

The arbitrator then evaluated the two affirmative defenses raised by the Union. First, the Union argued that Beaupre's repeated refusals to follow his supervisor's order were motivated by a sincerely held concern for his health. The arbitrator determined that this argument was not credible and that Beaupre's health was not the reason he refused to clean up the bottles. The Union alternatively argued that because the order to clean up the bottles followed so closely upon the sexual banter between Arsenault and the plant workers, Beaupre believed he might have been subjected to undue humiliation or embarrassment, or even risk of sexual assault. The arbitrator determined that this defense was entirely unpersuasive and that any apprehensions Beaupre might have had were not reasonable.

Since the arbitrator began his discussion by stating that "absent some persuasive affirmative defense [Beaupre] was guilty of the offense of insubordination," one might have expected the arbitrator to conclude his analysis after rejecting both affirmative defenses proffered by the Union. Instead, the arbitrator stated that there was "one remaining issue for discussion, that being the level of discipline imposed." After thus declaring that he was now exploring remedial possibili-

ties the arbitrator broke down the term "insubordination" into two types: straightforward insubordination, and insubordination in the presence of mitigating circumstances. The arbitrator reasoned:

> [Article 32] may well establish that in clear, straightforward cases of insubordination, without mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination. However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the company with just cause for termination. On the contrary, where significant mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified. This more complex fact situation must be considered under the general, just cause standard set forth in article 32, giving due weight to the fact that the parties have agreed that a pure case of insubordination, without mitigating considerations, would provide just cause to terminate.

Having distinguished straightforward insubordination from insubordination with mitigating circumstances, the arbitrator placed Beaupre's claim in the latter category. The arbitrator found that Beaupre's refusal to comply with his supervisor's directive was mitigated by his supervisor's misconduct, which "blurred the line between the supervisor and the workers." According to the arbitrator, once the supervisor joined in the ribbing and sexual banter, his "improper fraternizing with the workers created an environment where one of the employees might think, at least initially, that Arsenault was not acting in his supervisory capacity, but rather only as one of the guys joking around on the shop floor." The arbitrator concluded that "it was unjust for the Company to terminate the grievant for his insubordinate behavior which immediately followed." Nevertheless, despite

the presence of mitigating circumstances, the arbitrator concluded that Beaupre's protracted refusal to comply with the directive still constituted "insubordinate behavior." The arbitrator determined that:

> [Beaupre] should have been able to figure out that Arsenault had shifted gears and was now acting in his supervisory capacity; he should have promptly followed the directives of the person he knew to be his supervisor. Furthermore . . . Arsenault first alone and then with the assistance of [another supervisor] gave the grievant clear warning of the fact that his behavior had become insubordinate, and gave the grievant numerous opportunities over an extended period of time to abandon his initial refusal, and to perform the work as directed.

Ultimately the arbitrator concluded that while mitigating circumstances rendered the company's decision to terminate Beaupre unjust, Beaupre's insubordinate behavior over an extended period of time warranted a two week suspension without pay.

Summary Judgment

Poland Spring filed suit in district court to vacate the arbitration award. The court granted summary judgment, finding that the award exceeded the arbitrator's authority under the Agreement. The court held that in the Agreement there is "nothing about 'clear, straight-forward' cases, 'pure' cases, or 'mitigating circumstances.'" The court found that under the circumstances, the arbitrator lacked the authority under Article 32 to reinstate an insubordinate employee. The Union appealed.

Discussion

Judicial review of an arbitrator's decision is extremely narrow and deferential. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 10 (1st Cir. 2001). We

do not sit as a court of appeal to hear claims of factual or legal error by an arbitrator or to consider the merits of an award. *Misco, Inc.*, 484 U.S. at 36-37. We cannot vacate the award because the arbitrator misreads the contract, where there is room to do so. *Id. at 37-38.* Nor are we authorized to reject his honest judgment as to the appropriate remedy, if the contract gives him the authority to decide that question. *Id. at 38.* "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

Nevertheless, acknowledging that our role is a limited one is not the equivalent of granting limitless power to the arbitrator. *Georgia Pacific Co. v. Local 27, United Paperworkers Int'l Union,* 864 F.2d 940, 944 (1st Cir. 1988). The decision to settle labor-management disputes through arbitration is a wholly voluntary decision by private parties, grounded on their will as expressed in the collective bargaining agreement. *Id.* "Therefore, the paramount point to be remembered in labor arbitration is that the power and authority of an arbitrator is totally derived from the collective bargaining agreement and that he violates his obligation to the parties if he substitutes 'his own brand of industrial justice' for what has been agreed to by the parties in that contract." *Id.* (quoting *United Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960); *see also Misco Inc.*, 484 U.S. at 38. If the language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement. *Georgia-Pacific Co.*, 864 F.2d at 944.

In support of the arbitration award, the Union contends that the arbitrator did not unambiguously find Beaupre guilty of insubordination as that term is used in Article 32. Instead, it claims, the arbitrator found that because Beaupre's actions were mitigated by the horseplay of his supervisor, Beaupre's

conduct should not be treated as insubordination per se, but should rather be evaluated under the general, "just cause" standard also set forth in Article 32. That is, since Beaupre's culpability was lessened by his supervisor's own misconduct, the arbitrator properly considered Beaupre's misconduct under the flexible "just cause" provision of Article 32, rather than the "insubordination" standard of that same section.

We disagree with the Union's selective reading of the arbitration award. The award unambiguously concluded that Beaupre's misconduct on the night of February 5, 2000 constituted insubordination pursuant to Article 32 of the Agreement. The arbitrator unequivocally found: first, that a clear order was repeatedly given to Beaupre; second, that Beaupre fully understood the consequences of failure to comply with the order and yet repeatedly refused to do so; and finally, the arbitrator concluded that Beaupre's refusals to comply with the order constituted acts of insubordination subject to discipline under Article 32 of the agreement.

First, it is beyond dispute that the arbitrator found that Beaupre repeatedly refused to comply with his supervisor's directives. He concluded that "the grievant declined to follow this directive from Arsenault. Arsenault repeated his directive to the grievant, but the grievant continued to refuse to clean out the bottles from under the accumulation table."

Second, the arbitrator found as a fact that Beaupre fully understood the consequences of his failure to comply with his supervisor's directive. After his second refusal of the order, Beaupre accompanied Arsenault to the conference room for a disciplinary meeting. On the way there, Beaupre asked Arsenault whether "he was the man that was going to take the grievant's job over a bottle of water, and if he did, would that make him feel like a man." Based on that statement, the arbitrator concluded that "certainly, then, the grievant at least by that point understood that he could face termination for failing to comply with Arsenault's directive."

Finally the arbitrator concluded that Beaupre's knowing refusal to comply with the directive was "insubordinate" within the meaning of the Agreement. First, the arbitrator twice used the language "insubordinate behavior" to describe Beaupre's conduct on the night of February 5, 2000. Second, the portion of the award concerning Beaupre's culpability begins with the statement that "there is little doubt in this case that absent some persuasive affirmative defense, the grievant was guilty of the offense of insubordination." The award then proceeded to evaluate and reject the affirmative defenses raised by Beaupre, leaving little doubt that the arbitrator found Beaupre guilty of insubordination.

Upon reaching the conclusion that Beaupre's conduct was insubordinate, the arbitrator was "barred from further inquiry because such additional probing constituted 'ignoring the plain language of the contract.'" *Georgia-Pacific Corp. v. Local 27 United Paperworkers Int'l Union*, 864 F.2d 940, 945 (1st Cir. 1988) (quoting *Misco, Inc.*, 484 U.S. at 38). This Court has long held that once an arbitrator finds that an employee has committed an act specifically listed in the collective bargaining agreement as providing just cause for termination, the arbitrator is not free to fashion a separate remedy apart from the one provided by the parties' agreement. *See Georgia-Pacific*, 864 F.2d at 945; *S.D. Warren Co. v. United Paperworkers' Int'l Union*, 845 F.2d 3, 8 (1st Cir. 1988); *Metro Chevrolet, Inc. v. Union de Tronquistas de Puerto Rico*, 835 F.2d 3, 5 (1st Cir. 1987). The rationale for this line of cases is simple: contractual provisions like the insubordination clause of Article 32 are bargained for and inserted precisely to take discretion away from arbitrators charged with enforcing the collective bargaining agreement. Cf. *Georgia-Pacific Corp*, 864 F.2d at 945 ("'An arbitrator does not have unfettered discretion. He may not impose a remedy which directly contradicts the express language of the collective bargaining agreement.'") (quoting *Bruno's Inc. v. United Food & Com. Wkrs. Int'l*

Union, Local 1657, 858 F.2d 1529, 1531 (11th Cir. 1988)). Consequently, the plain language of Articles 32 and 33 left nothing to the arbitrator's discretion except to determine whether or not Beaupre's conduct was insubordinate.

In *Georgia-Pacific*, this Court held that nearly identical contract language gave the employer the right to discharge, leaving an arbitrator no discretion to fashion a remedy different from the parties' agreed-upon level of discipline. 864 F.2d at 942, 946.[1] Evaluating the agreement in Georgia-Pacific, we determined: (1) that the agreement specifying that committing an offense of dishonesty subjected an employee to immediate discharge was unambiguous on its face; (2) that the parties inserted the provision "precisely [to remove] optional choice on the part of the arbitrator;" and (3) that the arbitrator had no discretion to impose another form of discipline once he found dishonesty. *Id.* at 945-46.

By enumerating offenses that are subject to immediate discharge and distinguishing those offenses from other forms of misconduct that warrant a warning prior to discharge, the

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[1] In Georgia-Pacific, the agreement in issue provided that.

> Any employee may be discharged for just cause. Without limiting the generality of the foregoing some of the causes for immediate discharge are:
>
> . . . (5) dishonesty

. . . *Georgia-Pacific*, 864 F.2d at 942.

The arbitrator in *Georgia-Pacific* found that an employee had engaged in an act of dishonesty subjecting him to discipline. However, the arbitrator then overruled the company's decision to terminate the employee, based in part upon the employee's overall employment record. This Court found that the arbitrator had no discretion to impose his own remedy once he found that the employee was guilty of dishonesty. Looking at the agreement, we concluded that "it is difficult to imagine how one could use the English language to state more clearly that dishonesty leads to immediate discharge than is stated in [the agreement]." *Id.* at 946 (citation and quotation omitted).

parties manifested their intent to remove from the arbitrator's discretion the power to fashion his own remedy for those offenses expressly subjected to automatic discharge. *See S.D. Warren Co.*, 845 F.2d at 7-8 (finding that the purpose of an automatic discharge provision in a collective bargaining agreement reflects the parties' intent to "remove from the arbitrator the authority to determine a remedy once she concludes that a certain rule has been breached"). If the parties intended mitigating circumstances to affect whether insubordination constitutes just cause for termination, then they would have expressed their intent in the contract. Because we find that the arbitrator determined that Beaupre was guilty of insubordination, his decision to fashion a separate remedy due to mitigating circumstances impermissibly substituted his own notions of industrial justice over those established by the contract. *Id.*; accord *Misco*, 484 U.S. at 38.[2]

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[2] The Union asserts that instead of applying Georgia-Pacific, our analysis ought to be guided by *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8 (1st Cir. 2001) (holding that an arbitrator's decision that conduct did not constitute gross insubordination drew its essence from the contract) and *Crafts Precision Industries Inc. v. Lodge No. 1836*, 889 F.2d 1184 (1st Cir. 1989) (upholding an arbitrator's determination that some types of insubordination warrant discharge while other less serious instances may warrant only suspension). We disagree. There are two key issues distinguishing this case from the rule of law established in *Keebler* and *Crafts Precision*.

First, as we explained in *Keebler*, *Keebler* does not apply where, as is the case here, "the arbitrator unambiguously found that the grievant had committed conduct listed in his employment agreement as grounds for termination." *Keebler*, 247 F.3d at 14 n.2.

Second, the language of the collective bargaining agreements involved in both *Keebler* and *Crafts Precision* was substantially more open and ambiguous than the contract language in *Georgia-Pacific*, *Warren* and the instant case. As we explained in *Crafts Precision*, the question of whether an arbitrator exceeded his authority will often turn on whether the agreement delegated open-ended discretion to the arbitrator, or instead, whether the agreement expressly provided that certain types misconduct

Lastly, the Union argues that because the collective bargaining agreement did not define the term insubordination, it was necessary for the arbitrator to devise a definition of insubordination and determine whether the actions of Beaupre were those which constitute insubordination warranting termination under the Agreement. According to this argument, when the arbitrator distinguished between straightforward insubordination and insubordination in the presence of mitigating circum tances, this was precisely the type of interpretive analysis arbitrators are regularly called on to do. Consequently, rather than fashioning a separate remedy at odds with the one provided in the contract, the arbitrator merely clarified the latently ambiguous term insubordination and determined that the conduct involved here was simply too minor to constitute insubordination as that term was intended by the parties.

Were it in fact true that the arbitrator was merely interpreting the term insubordination, this argument might have some merit. After all, the Union correctly asserts that arbitrators

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shall constitute just cause for discharge. *Crafts Precision*, 889 F.2 at 1185; compare *Keebler*, 247 F.3d at 12-13 (noting that the agreement expressly required arbitrator to distinguish between gross insubordination, which would be subject to immediate discharge, from less serious instances of insubordination, which would not); and *Crafts Precision*, 889 F.2d at 1185-86 (noting that the agreement vested the employer and arbitrator with the discretion to distinguish conduct that "may result in suspension" from conduct that warrants discharge) with *Georgia-Pacific*, 864 F.2d at 942 (involving a contract which provided that any "employee may be discharged for just cause" and then expressly listed dishonesty as "one of the causes for immediate discharge"). The language in the instant agreement is nearly-identical to that of *Georgia-Pacific* in that it enumerates misconduct which may warrant discharge without warning. That is, it provides that "just cause for discharge *shall include* . . . insubordination." (Emphasis added). Unlike *Keebler* and *Crafts-Precision*, the instant agreement lacks any language that would authorize an arbitrator to distinguish between degrees of insubordination, or permit an arbitrator to select from a variety of disciplinary remedies.

have significant discretion to interpret the terms of a collective bargaining agreement. It is up to the arbitrator to decide whether a given pattern of conduct constitutes insubordination. Furthermore, the term insubordination is not defined in the agreement and is obviously susceptible to multiple interpretations. Thus, the arbitrator here certainly would have been free to decide that Beaupre's conduct was simply too minor to rise to the level of insubordination as that term is used in the contract.

Nevertheless, in this case it cannot be said that the arbitrator's mitigating circumstances analysis was merely part of an interpretation of the term insubordination. First, the arbitrator never debated the meaning of the term insubordination, and concluded that Beaupre was guilty of "insubordinate behavior" that "extended over a lengthy period of time." Second, the arbitrator did not begin his mitigating circumstances analysis until after he had established Beaupre's culpability and stated that there was only "one remaining issue for discussion, that being the level of discipline imposed." Clearly, the mitigation section of the award only arose when the arbitrator was considering his remedial options, and not when he was supposedly engaged in an interpretation of the term insubordination.

Beaupre's situation is a regrettable one. His supervisor's misconduct undoubtedly temporarily blurred the line separating supervisor and employee, and in so doing, created a scenario in which Beaupre, insulted and hurt by Arsenault's sudden transformation from "one of the guys" to stern company supervisor, felt justified in refusing the order. Nevertheless, Beaupre's defiance outlasted the confusion caused by Arsenault's horseplay. He repeatedly refused a company directive even after that directive had become a formal warning delivered repeatedly by two supervisors. The arbitrator deemed this conduct insubordinate, and, having done so, lacked the contractual authority to mitigate the

disciplinary action provided by the collective bargaining agreement. Consequently, the arbitration award is unenforceable and the district court's judgment is affirmed.

Affirmed. No costs are imposed.

BOUDIN, *Chief Judge* (Concurring).

Leo Beaupre, then an employee of Poland Spring Corp. at its facility in Maine, refused in February 2000 several direct instructions from two supervisors to pick up some bottles scattered under a table. The company's contract with Beaupre's union provides that "discipline and discharge shall occur only for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following: . . . Insubordination . . . ." After a warning, Beaupre was discharged, and the union sought arbitration pursuant to the contract.

In due course, the arbitrator found that Beaupre had clearly violated direct orders from his superiors even after he was advised that this could be a firing offense, and the arbitrator found unsupported several excuses offered for Beaupre's refusals (e.g., health concerns). However, the arbitrator ruled that under the contract "mitigating considerations" permitted the arbitrator to conclude that termination was too severe a penalty; finding mitigation here—for example, tasteless jokes by Beaupre's direct supervisor—the arbitrator ruled that the penalty should be reduced to two weeks' suspension without pay.

Affirming the district court, the panel majority now holds that the arbitrator exceeded his authority in directing Beaupre's reinstatement. It is common ground that the arbitrator is bound by provisions of the contract but also that the arbitrator can construe the contract. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). In effect, the arbitrator takes over the court's role of initial construction; but there remains a vaguely defined limit: a reviewing court may still conclude that the arbitrator is rewriting the terms instead of construing them. *See id.*

Here, the arbitrator could permissibly have read the contract to mean that some acts of disobedience constitute

"insubordination" within the meaning of the contract and that other, less severe acts—although literally disobedience—do not. "Insubordination" is not defined in the contract nor is it self-defining and, reading the provision in context, a judge (and even more surely an arbitrator) would be likely to exclude trivial disobedience, such as a refusal to light the supervisor's cigarette. Consider that lack of cleanliness is also listed as a basis for discharge under this contract, but certainly a smudge on a nose would not qualify for discharge. So, taking account of the severity of the disobedience is, within broad limits, surely a part of the arbitrator's authority.

Viewed de novo, it is a more difficult question whether the present contract can be read to limit management's right to discharge an insubordinate employee where there exist "mitigating considerations." Of course, lack of the severity of disobedience could be viewed as a mitigating consideration; but the arbitrator's claim in this case is not focused on lack of severity. Rather, he claimed and exercised a broader mandate to take into account anything that might equitably bear on whether a discharge for disobedience seemed fair and proportionate.

Most judges, interpreting this contract for themselves, would probably reject this latter reading. Taking the contract as a whole, it explicitly reserves disciplinary authority to management, save as constrained by other provisions. Most judges would likely take the "just cause" provision quoted above as licensing management to discharge an employee who was patently "insubordinate," even if he had served the company loyally for a decade and had a sick wife at home and a child in college. The contract does not say that discharge for insubordination is permitted only where "just" or "fair."

Even so, the parties in this case empowered an arbitrator to interpret the contract and that includes the power to adopt readings that a judge might reject if no arbitrator were in-

volved. Does this include a reading that allows the arbitrator to say that disobedience is "insubordination" if there are adequate "mitigating considerations" that have nothing to do with whether the disobedience was clear, deliberate, and pertinent to the employee's duties? This is a stretch of language, to be sure, but whether it goes too far to be a permissible arbitrator reading is something about which reasonable judges might differ.[3]

This debatable issue has been resolved in this circuit. In two different cases, this court has ruled that contracts, similarly structured as that at issue here, give management a right to discharge an employee guilty of a listed offense, and that an arbitrator cannot mitigate the penalty because of ameliorative circumstances. *See Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir. 1988); *S.D. Warren Co. v. United Paperworkers' Int'l Union*, 845 F.2d 3 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988).

In *S.D. Warren*, 845 F.2d at 6, the contract reserved to management "sole" authority to discipline, subject to appended rules; and the appended rules said that "violations" of specified rules were "causes for discharge," including "possession" of marijuana on company property. The discharged employees had possessed marijuana at the plant, but the arbitrator ruled that the sanction was too severe. Id. The Warren decision held that the arbitrator had exceeded his power. *Id.* at 8.

A similar conclusion was reached in *Georgia-Pacific*, 864 F.2d at 942-43: the contract permitted discharge for "dishon-

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[3] For example, immediate consideration of "fairness" might push in one direction; in the other, the long-term cost of unpredictability leading in turn to increased difficulty in negotiating even more detailed provisions. Another factor, which might cut either way, might be the practice in the industry. Yet another would be how far the particular equities urged still had some connection with the statutory language.

esty," and the employee had reported himself unable to work for medical reasons and had instead participated in a golf tournament. The arbitrator ordered reinstatement based on the employee's many years of service. *Id.* at 944. Again, the court held that the arbitrator was improperly rewriting the contract. *Id.* at 946. Thereafter, this court several times acknowledged that *S.D. Warren/Georgia-Pacific* were the rule even in cases where the court managed to distinguish those cases on their facts. *E.g., Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8, 13-14 & n.2 (1st Cir. 2001); *Crafts Precision Indus., Inc. v. Lodge No. 1836, Int'l Ass'n of Machinists*, 889 F.2d 1184, 1185-86 (1st Cir. 1989).

Based on first principles and Supreme Court precedent, the dissenting opinion in this case argues (in substance) that S.D. Warren and Georgia-Pacific were mistaken. The first principles, themselves derived from Supreme Court precedent, are inevitably quite general statements about the scope of and limits to arbitrator authority; some language helps Beaupre, some helps the company, and none of it in a debatable case like this one would be decisive if we were deciding this case without any governing circuit precedent.

As for the Supreme Court's holdings, only Misco has facts arguably close to our own.[4] In *Misco*, 484 U.S. at 41-42, the Court said that an arbitrator could impose a lesser remedy than discharge, arguably in a situation not too far from our own. But the Court's rationale is somewhat cryptic and turned in some measure on a peculiar stipulation of the parties that

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[4] Other decisions include *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001). In *Eastern*, 531 U.S. at 60, 67, the Court affirmed the arbitrator's award because the arbitrator did not find "just cause" for discharge, and the parties, by agreement, entrusted the remedial decision to the arbitrator. In *Garvey*, 532 U.S. at 510, the Court held that an arbitrator's award could not be set aside because of a court's disagreement with the arbitrator's factual findings.

the issue in dispute was the existence of "just cause," which was said to be open to arbitral determination. *Id.* Read evenhandedly, *Misco* is of some help to Beaupre but also could itself be distinguished.

But this panel is not free to resolve this case based on first principles or a reading of *Misco* favorable to Beaupre. *S.D. Warren* was decided after *Misco*—indeed, on remand after an earlier *S.D. Warren* decision had been vacated by the Supreme Court for reconsideration in light of *Misco*. *S.D. Warren*, 845 F.2d at 4. The decision in *S.D. Warren* is expressly a determination that neither *Misco* nor first principles preclude the decision by this court in *S.D. Warren*—a decision that pretty clearly embraces our own facts.

If our own case were before us as the first one to arise after Misco, its proper disposition would present a difficult and interesting issue. But the rule that binds successor panels, which serves to make law predictable, is decisive for me. *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.), *cert. denied*, 502 U.S. 969 (1991).

LYNCH, *Circuit Judge* (Dissenting).

The arbitrator interpreted Article 32 of the collective bargaining agreement to say the type of insubordination meant to be encompassed within the "just cause" for termination was insubordination without any mitigating circumstances. The majority says that this interpretation exceeded the arbitrator's scope of authority. I disagree, and so, with respect, I dissent.

I do agree that this case can be distinguished from *Keebler Co. v. Truck Drivers, Local 170*, 247 F.3d 8 (1st Cir. 2001) and *Crafts Precision Industries, Inc. v. Lodge No. 1836, International Ass'n of Machinists*, 889 F.2d 1184 (1st Cir. 1989), on the grounds given by the majority. I also agree that the district court could reasonably have concluded that it was bound to reverse the arbitrator under *Georgia-Pacific Corp. v. Local 27, United Paperworkers International Union*, 864 F.2d 940 (1st Cir. 1988), or *S.D. Warren Co. v. United Paperworkers' International Union*, 845 F.2d 3 (1st Cir.), cert. denied, 488 U.S. 992 (1988). Nonetheless, developments in the law of judicial review of arbitral awards make me doubt that Georgia-Pacific is good law now.

Under that evolving law, I think we are required to affirm the arbitrator's award.[5] The majority relies on language from *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), exempting awards that are

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[5] Alternatively, remand to the arbitrator would be preferable to reversal. "Where the basis for an arbitrator's decision is unclear, but the arbitrator's opinion suggests that the decision does not draw its essence from the collective bargaining agreement, remand is appropriate to have the arbitrator clarify the basis for his or her decision." *Young Radiator Co. v. Int'l Union, UAW*, 734 F.2d 321, 326 n.5 (7th Cir. 1984); *see also Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Int'l Bhd. of Teamsters*, 29 F.3d 742, 747 (1st Cir. 1994)(remand appropriate when arbitrator may have exceeded his authority); *Randall v. Lodge No. 1076, Int'l Ass'n of Machinists*, 648 F.2d 462, 468 (7th Cir. 1981)(same).

merely "[the arbitrator's] own brand of industrial justice" from a general policy of judicial deference. This qualification was reiterated in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). In Misco, however, the Court went on to emphasize language which the majority recites at the outset, but overlooks in its reasoning: "But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38. The Misco Court then reversed the court of appeals decision to overturn an arbitral award for misreading the evidence. *Id.* at 45.

The Supreme Court has continued to mandate judicial deference to arbitral awards in subsequent decisions. In *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), the Court again reversed a decision overturning an arbitral award. In Eastern, the arbitrator had ordered reinstatement of an employee who had been fired for failing a random drug test. The arbitrator reasoned that mitigating circumstances—including a long employment history and stress caused by family problems—outweighed the admitted drug use. *Id.* at 60, 67. The lower courts had set aside the award on public policy grounds, a reason rejected by the Supreme Court.

Last year, the Court strongly reaffirmed the high standard required for judicial interference in arbitral decisions. In *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001), the Court overturned the Ninth Circuit's reversal of an arbitral award. The Ninth Circuit had found reversal warranted because the arbitrator "dispensed his own brand of industrial justice," *id.* at 507, in refusing to consider evidence supporting Garvey's claim. The court of appeals labelled the arbitrator's finding "completely inexplicable" and "bordering on the irrational." *Garvey v. Roberts*, 203 F.3d 580, 590 (9th

Cir. 2000). Nonetheless, the Supreme Court responded by reiterating its holdings in *Misco* and *Eastern:*

> Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. We recently reiterated that if an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision."

532 U.S. at 509 (citations omitted). Moreover, the Court went on to conclude that the error alleged—ignoring important evidence—did not even rise to the standard of serious error: "The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court." *Id.* at 511 n.2. In short, the court of appeals may not substitute its own contractual interpretation for the arbitrator's, without showing more than "serious error." That is not the case here.

The majority finds that the arbitrator exceeded his authority in interpreting the collective bargaining agreement and in his decision to reinstate Beaupre. But the agreement gives him precisely that authority. The arbitrator's authority is set forth in Article 33, which governs grievance and arbitration. The presentation of a grievance is required to resolve "differences . . . as to the meaning or application of the provisions of the Agreement." Any dispute after the third step of the grievance process is submitted to the arbitrator. It is true that Article 33 contains a restriction: "The arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement." Even with such a restriction, it is commonplace that an arbitrator has authority to construe the terms of the agreement

he is enforcing. *See, e.g., Steelworkers*, 363 U.S. at 599 ("As we [have] emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."). I see nothing in this clause which prohibits the arbitrator from construing the agreement, as he has done here.

The majority also overestimates the restrictions placed on arbitrators' ability to fashion a remedy. The majority holds that "once an arbitrator finds that an employee has committed an act specifically listed in the collective bargaining agreement as providing just cause for termination, the arbitrator is not free to fashion a separate remedy apart from the one provided by the parties' agreement." Opinion at 12-13. The majority takes this to mean that once the arbitrator found insubordination in this case, he had no discretion as to remedy—he was bound to uphold the employee's termination. But this view overlooks well-established law granting the arbitrator the same level of freedom in crafting a remedy as he has in contractual interpretation. "Where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *Misco*, 484 U.S. at 38. In *Misco*, it was the use or possession of controlled substances on company property which was listed as cause for discharge. The arbitrator's authority was limited to interpretation and application of terms in the contract. Nonetheless, the Court upheld the arbitrator's reinstatement of an employee terminated for drug use on company property. *Id.* at 35. The remedy of reinstatement, under a contractual regime similar to the one at issue here, was within the power of the arbitrator to fashion.

Admittedly, this result—which I believe to be mandated by Supreme Court precedent—poses some problems. It is not entirely satisfactory to say to employers that they can draft the collective bargaining agreement to clearly restrict the arbitrator from exercising the authority that the arbitrator applied here. The realities of what happens at the bargaining table may make this illusory. Article 32 was admirably drafted to give management some flexibility and give workers the protection that not every instance of insubordination must mean termination. It can be questioned why the price of that flexibility should be to permit an arbitrator to second guess management's judgment to be less forgiving of an employee's disobedience of a direct order. Here, the employer's unforgiving attitude is not irrational. Beaupre was asked several times, including by a more mature and senior supervisor, to comply with Arsenault's directive. But that is not the question for the court.

Instead, under the law that the Supreme Court has crafted, we must defer to the arbitrator so long as he is "even arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 484 U.S. at 36. I think we must defer to the award. The majority's decision is thoughtful, well-written, and sensitive. The majority and I simply have a good faith disagreement about the law. To the extent *Georgia-Pacific* and *S.D. Warren* are taken to control the outcome of this case, I think it time for this court to disavow both of those cases as inconsistent with Supreme Court precedent. With regret, I find myself in dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Civil No. 01-180-P-H

POLAND SPRING CORPORATION,
Plaintiff,

v.

LOCAL 1445, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO,
Defendant.

January 3, 2002, Decided

OPINION

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This case involves the enforceability of an arbitrator's award reinstating and ordering back pay for a terminated employee. Under governing First Circuit precedent, the award exceeded the arbitrator's authority. Accordingly, the defendant Union's motion for summary judgment enforcing the award is DENIED, and the plaintiff employer's motion for summary judgment vacating the award is GRANTED.

Under the collective bargaining agreement between Poland Spring Corporation and Local 1445, United Food & Commercial Workers Union, "insubordination" is explicitly made "just cause for discharge." Collective Bargaining Agreement ("CBA"), Art. 32. Unlike some other bases for discharge, there is no requirement of prior warning in cases of insubordination. CBA, Art. 32. Here, the arbitrator found explicitly that a terminated employee was guilty of insubordination.

Award of Arbitrator ("Award") at 7-10. He proceeded to rule, however, that "the level of discipline" was a "remaining issue for discussion." Award at 10. He then stated that Article 32 created a "per se rule" of discharge "in clear, straight-forward cases of insubordination, without mitigating considerations." Award at 11.

> However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination. On the contrary, where significant, mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified. This more complex fact situation must be considered under the general, just cause standard set forth in article 32, giving due weight to the fact that the parties have agreed that a pure case of insubordination, without mitigating considerations, would provide just cause to terminate.

Award at 11.

Nothing in the collective bargaining agreement supports the Arbitrator's reasoning. Article 32 states directly and concisely that "the parties agree that just cause for discharge shall include . . . insubordination." CBA, Art. 32. There is nothing about "clear, straight-forward" cases, "pure" cases, or "mitigating circumstances." See CBA, Art. 32. (In fact, the arbitrator considered and rejected the Union's proffered "affirmative defenses" to the charge of insubordination.) The collective bargaining agreement also provides that an "arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement." CBA, Art. 33. Under the authority of *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 845 F.2d 3, 7-8 (1st Cir. 1988), and *Georgia-Pacific Corp. v. Local 27*, 864

F.2d 940, 944-45 (1st Cir. 1988), I conclude that the arbitrator exceeded his powers in ordering the reinstatement of the insubordinate employee.

The defendant's motion for summary judgment is DENIED and the plaintiff's motion for summary judgment is GRANTED. Judgment shall be entered setting aside and vacating the arbitrator's award.

SO ORDERED.

DATED THIS 3rd DAY OF JANUARY, 2002.

/s/ D. Brock Hornby
D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1064

POLAND SPRING CORPORATION,
Plaintiff/Appellee,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 1445,
Defendant/Appellant.

January 22, 2003, Decided

BEFORE: BOUDIN, *Chief Judge*, TORRUELLA, SELYA, LYNCH, LIPEZ * and HOWARD, *Circuit Judges.*

ORDER OF THE COURT

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular, active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc, with one judge dissenting,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied. Dissent follows.

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* Judge Lipez is recused from this matter.

DISSENT:

LYNCH, *Circuit Judge* (Dissenting).

I dissent from the denial of en banc review. The outcome of this case—which is based on two prior First Circuit cases, *Georgia-Pacific Corp. v. Local 27, United Paperworkers International Union*, 864 F.2d 940 (1988), and *S.D. Warren Co. v. United Paper-workers' International Union*, 845 F.2d 3 (1st Cir. 1988)—is, to my view, contrary to the deference to arbitrators required by *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). It is true that Misco warns that arbitrators may not rewrite contracts and substitute their own notions of industrial justice. See *id. at 36*. The majority opinion finds that is what the arbitrator did here, a conclusion I think erroneous and contrary to Misco's mandate that federal courts must defer to the arbitrator so long as he is "even arguably construing or applying the contract and acting within the scope of his authority." *Id. at 38; accord Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001); *E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000).

The majority's opinion intensifies a circuit split. It runs contrary to the law of other circuits which carefully and explicitly delimit the scope of judicial review of arbitral awards on the ground that the arbitrator has exceeded his authority. *See Madison Hotel v. Hotel & Rest. Employees, Local 25*, 330 U.S. App. D.C. 212, 144 F.3d 855, 858-59 (D.C. Cir. 1998) ("While courts . . . may review the substance of an arbitration award, only the narrowest circumstances will justify setting the award aside. An arbitrator cannot, for instance, render a judgment based on external legal sources, wholly without regard to the terms of the parties' contract.") (internal quotation omitted); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("An arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the

contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny.") (internal quotations omitted); *Arch of Ill. v. District 12, United Mine Workers*, 85 F.3d 1289, 1292 (7th Cir. 1996) (upholding arbitral award that employee's sleeping on the job is not just cause for termination and saying "it is only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract . . . that the award can be said not to 'draw its essence from the collective bargaining agreement.'") (internal quotations omitted).

It may be difficult for courts to refrain from substituting their own interpretation of the collective bargaining agreement, but they are nonetheless obligated to do so. The question, in the apt words of the Seventh Circuit, "is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 579 (7th Cir. 2001) (Easterbrook, J.) (rejecting argument that because courts view issues of contract interpretation as issues of law that justifies setting aside an arbitral award for legal errors) (internal quotation omitted). In sum, "courts have no business overruling [an arbitrator] because their interpretation of the contract is different from his." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

The issue is important and will face us again. Discharge of employees for insubordination or other reasons said to amount to grounds for termination is a recurring theme in labor arbitration. I regret that this court has chosen not to address the issue on rehearing en banc. Perhaps the Supreme Court will choose to do so.

APPENDIX D

VOLUNTARY LABOR ARBITRATOR TRIBUNAL

IN THE MATTER OF ARBITRATION BETWEEN
POLAND SPRING CORPORATION

AND

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 1445

CASE NAME: Beaupre Termination

AWARD OF THE ARBITRATOR

The UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

Because the supervisor's misbehavior contributed to the initial breakdown in the proper relationship between supervisor and employee, the Company violated the contract by discharging Leo Beaupre as a consequence of the February 5 incident.

The Company shall reduce the grievant's discharge to a suspension of two weeks without pay. The Company shall reinstate the grievant and make him whole for pay and benefits he lost due to the termination of his employment without just cause.

Date: April 16, 2001

Philip Dunn, Arbitrator

Appearances: Warren H. Pyle, Esq. of Pyle, Rome, Lichten & Ehrenberg, PC , Counsel for the Union

Richard R. Boisseau, Esq. of Kilpatrick Stockton LLP, Counsel for the Company

STIPULATED ISSUE

Did the Company violate the contract by discharging Leo Beaupre?

If so, what shall be the remedy?

FACTUAL BACKGROUND

The grievant was hired by the Company on September 28, 1998, as a multi-operator. There is no evidence that prior to February 5, 2000, he had any problems regarding non-compliance with directives from supervisors, or otherwise challenging or undermining their authority of supervisors to manage the workplace. At some point prior to February 2000, the grievant had moved into the job classification of palletizer operator. A palletizer is a machine that loads case lots of bottles onto pallets, and wraps the full pallets in plastic for shipping. The palletizer operator's job is responsible for keeping the machine running. As part of this job, he places empty pallets on the machine, and removes loaded pallets.

All bargaining unit employees are expected to share in keeping the bottling plant clean. Accordingly, it is expected that each employee will clean up as needed under and around his machine, during the course of any shift. This general housekeeping expectation applied to the grievant as well. His palletizer machine was elevated on legs above the floor, so the operator would at times need to clean out scrap bottles or other litter from under the machine.

The incident which led to the grievant's termination occurred on the night shift that ran from 10 p.m. on February

5 through 6 a.m. on February 6. The grievant's supervisor that night was Mike Arsenault, who that night was supervising production lines 1, 11 and 12. The grievant was assigned to operate the palletizer machine on line 12.

Arsenault had only recently promoted up from a bargaining unit position into a supervisory role. Arsenault testified without contradiction that there is somewhat of a tradition in this plant of bargaining unit members teasing or ribbing a new supervisor who has recently promoted out of the bargaining unit into a supervisory role.

At some point during the February 5, 6 night shift, lines 11 and 12 were temporarily down. A group of line 11 and 12 employees got together to talk outside of the filler room. This group included the grievant, Arsenault, and production workers Gaworski, Ouellette, Brewer, and Simaglou. The bargaining unit employees rather mercilessly and crudely teased Arsenault, stating in starkly graphic terms how he had provided an imaginative variety of sexual favors to the plant manager, also a male, during work time in the manager's office, in order to gain his promotion to a supervisory position. The grievant testified that he did not share in making the statements in this regard, but he did join in [nervously] with the laughter amongst the group. Arsenault testified that the grievant shared in the crude banter.

There is no dispute that Arsenault for some period of time shared right in with this joking around. The grievant testified without contradiction that Arsenault at one point even pretended to call up to the plant manager on his radio, to tell the manager that Arsenault would be right up to see him.

Arsenault testified that this bantering continued for 30 seconds to a minute. The grievant testified that it lasted for as much as 8 to 10 minutes. None of the other participants in this teasing session were called to testify in the arbitration proceeding.

Arsenault testified that the bantering ended when Simaglou received a radio call to go to another assignment; Arsenault then assigned the other employee to various work tasks. The grievant, in contrast, testified that Arsenault suddenly "became unglued," stated "That will be enough," and ordered everyone back to work.

It is undisputed that when the banter ended, Arsenault directed that the grievant and Gaworski go into the filler room to help clean up bottles that were on the floor. Gaworski left to go into the filler room.

While Arsenault and the grievant testified as to different words expressed by the two of them, it is undisputed that Arsenault came to realize that due to an asthmatic condition, the grievant could not work in the filler room where elevated levels of ozone could be present. Upon realizing that, Arsenault withdrew his instruction that the grievant go to work in the filler room.

Regarding this point forward in the chronology of events of February 5 and 6, the grievant and Arsenault gave differing testimony regarding the precise words said by each of them. It is clear from the record, however, that the following events transpired. After the grievant indicated that he could not work in the filler room, Arsenault directed the grievant instead to clean bottles out from under the accumulation table.[1] The accumulation table is a large table where filled bottles coming from the filler operation can accumulate if the palletizer operation is interrupted. One would need to crawl to get under the accumulation table, which stands on legs a couple of feet off the floor.

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[1] Arsenault testified that he told the grievant, "I need you to pick up the bottles under the accumulation table." The grievant testified that Arsenault pointed under the accumulation and said, "I want you to crawl underneath there and get the bottle of water."

The grievant declined to follow this directive from Arsenault.[2] Arsenault repeated his directive to the grievant, but the grievant continued to refuse to clean out the bottles from under the accumulation table. Arsenault testified that he then warned the grievant that his non-compliance would constitute an act of insubordination which could result in the termination of the grievant's employment. The grievant continued his refusal to clean out the empty bottle(s) from under the accumulation table.

Arsenault then directed the grievant to accompany him to the conference room. On the way there, the grievant testified, he asked Arsenault if he was the man that was going to take the grievant's job over a bottle of water, and if he did, would that make him feel like a man.[3] Certainly, then, the grievant at least by-that point understood that he could face termination for failing to comply with Arsenault's directive. Still, the grievant did not indicate that he would perform the assigned work.

On the way to the conference room, Arsenault radioed to a more experienced supervisor, Seth LaPlante, and asked him to meet Arsenault in the conference room. LaPlante came and met Arsenault and the grievant en route to the conference room. Arsenault and LaPlante both testified that as the three of them proceeded toward the conference room, the grievant said words to the effect, "If you want to show what your power is, I am going to show what my power is." The grievant testified that he made no such statement. Arsenault informed LaPlante that they were on the way to the

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[2] The grievant testified that he said, "You know, Mike, . . . my crawling days are over; it's hard for me to crawl into bed just as well as it is hard for me to crawl out of bed." Arsenault testified that the grievant said, "It's not my job, I'm a shipper, I'm not going to do it."

[3] This comes from the written statement prepared by the grievant on the evening of February 6.

conference room because the grievant had refused to comply with Arsenault's directive to perform certain work.

The grievant testified that en route to the conference room, he asked that a union steward be called to represent him there. Arsenault did not recall such a request, but acknowledged that it may have happened.

The three arrived at the conference room. Also there were bargaining unit members Joey Nickerson and Lynn Ledbetter were in the conference room, as well. Arsenault asked them if a union steward was on duty, and Ledbetter answered no. Arsenault then asked if they would be willing to sit in as witnesses, and they said they would. Arsenault began to write up a suspension notice to the grievant.

Arsenault and LaPlante again asked the grievant if he would go out and pick up the bottles as directed. He responded that he did not know what they were talking about, Arsenault and LaPlante testified. The grievant, in contrast, testified that he refused to talk in the conference room, because no union steward was present. The grievant testified that he did ask what the disciplinary action would be; and LaPlante answered, suspension pending investigation of grounds for termination.

The grievant still did not agree to go and perform the assigned work. He was suspended pending investigation, and sent home.

On February 6, the Union filed a grievance signed by the grievant and Chief Steward Barnies. That grievance stated as the "nature of grievance,"

> 2-5-00 3rd shift . . . . [Grievant] was suspended pending investigation for alleged insubordination, without just cause.
>
> . . . [Grievant] states his supervisor and other employees were acting unprofessional on the floor, and . . .

> [Grievant] feels that Mike Arsenault (supervisor) tried to embarrass Leo in front of his peers by making him crawl under a conveyer for one bottle, therefore the group was making unwanted gestures.

It is noteworthy that the grievance as written makes no reference whatsoever to any health or safety concern.

Also on February 6, the grievant wrote up for his own use a statement of what had transpired on the prior night's shift. The middle of this writing states,

> When Mike realized he was being laughed at and not with he got mad, and then ordered Dennis and myself to go and work in the filler room to pick up bottles on line 11, I said that I had a Dr. note saying that I couldn't cause I had asthma and that I was not to be exposed to the ozone. I then said I was going back to my palletizer to do some more clean up. Mike said better yet quote and unquote crawl under the conveyor table and pick up that water bottle. I said to him that my crawling days were over, and that it took everything for me to crawl in to bed at night and to crawl out of bed in the morning. (I'm sorry but I did not feel comfortable bending over in front of Mike or in front of my co-workers after all of the sexual talk that took place seconds earlier.)

It is interesting that the grievant in this private note for his own use clearly articulated a specific medical concern of asthma, explaining why he could not work in the filling room where elevated levels of ozone could be present. He made no comparable, specific reference to any liver ailment to explain why he could not clean under the accumulation table. The reference to "my crawling days are over" is at best vague and unspecific, and appears to relate more to his stated embarrassment in bending over after all the sexual banter (as clarified in the parenthetical comment immediately following).

At the step 2 hearing, Chief Steward Barnies asserted that there had been safety/health concerns which caused the

grievant to decline to pick up the bottle(s) from under the accumulation table. According to Barnies, he cited to the Company both a liver problem and a back problem that the grievant had, which would have made it difficult for him to get down on the floor and clean out underneath the accumulation table. According to the Company's witnesses, the only health concern cited by Barnies was the back problem, which was the subject of a worker's compensation claim; there was no reference to any liver condition. The Company checked the grievant's worker's comp file and found that the back problem resulted only in a restriction of no overhead lifting. Because there was no restriction on stooping or bending, the Company concluded that no medical concern had precluded the grievant from cleaning scrap bottles out from under the accumulation table.

Barnies at step two also raised to other points in the grievant's defense. One was that—Arsenault had singled the grievant out for harassment because of a business deal gone bad between Arsenault's father and the grievant. The other was that after the sexual banter, the grievant felt it would have been embarrassing and humiliating to have to bend down in front of Arsenault and co-workers, to clean under the accumulation table. The Company concluded that these issues had not been raised at the time that the grievant refused Arsenault's order; but even if they had been, they would not have excused the grievant from complying with Arsenault's directive.

Following the step 2 grievance meeting, the Company converted the grievant's suspension pending investigation to a termination of employment.

At step three, the Union again cited the sexual banter and asserted that the grievant's non-compliance with Arsenault's directive was because the grievant felt it would be embarrassing and humiliating to bend over in front of Arsenault and co-workers. According to the Union, there

also was some reference at step three to the grievant's liver condition. The Company witnesses testified that there was no reference at step 3 to any medical, health/safety concern which would explain the grievant's refusal to clean under the accumulation table.

A few days after the step three meeting, Business Agent Dennis Norton came and spoke with Mr. Dudukovich the Company's human resources manager. Norton explained that the grievant had hepatitis C, and was taking Interferon. Norton told Dudukovich that the grievant had not provided this information to the Company earlier, either at the February 5 incident or in the grievance procedure, because he felt the information about his liver condition and taking Interferon was confidential and did not want it spread around the shop floor.[4]

The Company adhered to its decision to terminate the grievant, and the Union appealed its grievance challenging that termination to arbitration.

DISCUSSION

There is little doubt in this case that absent some persuasive affirmative defense, the grievant was guilty of the offense of insubordination on the February 5, 2000 night shift. Arsenault repeatedly ordered the grievant to clean out

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[4] The grievant, however, gave the following testimony. When his doctor prior to February 2000 placed the grievant on Interferon, his doctor instructed the grievant that he should inform management, in case side effects caused the grievant to need to leave work. The grievant then did tell the head supervisor on the third shift, Tom Wiencek, and Shop Steward McLean, that the grievant had a liver condition and was taking Interferon for it. Wiencek and the grievant agreed that Wiencek would so inform other third shift supervisors of third shift of this medical information, on a need to know basis. This establishes that the grievant was fully prepared to inform his supervisors in detail of his liver ailment, and the medication he was taking as a result, whenever necessary in the context of his work.

the scrap bottle(s) from under the accumulation table. The grievant repeatedly refused to comply with that directive, even after first Arsenault and then LaPlante made it clear to him that he could be terminated for so refusing.

The Union raises two primary defenses.[5] One involves a claim that the grievant's health or safety would have been compromised, were he to have complied with Arsenault's directive. The second involves the claim that the grievant would have been subjected to undue humiliation or embarrassment, were he to have bent over to clean under the accumulation table. The Union also raises a claim under *NLRB v. Weingarten*, 420 U.S. 265 (1975), arguing that the grievant was prejudiced by the Company's insistence upon proceeding with a disciplinary interview, even though the grievant had asked for a union steward to attend that interview but no steward was available.

The Union failed to meet its burden of proving that the health and safety exception was applicable in this case. I base this conclusion upon a number of considerations.

First, it is telling in the extreme that grievant told Arsenault with specificity that a medical condition—ozone sensitivity which could trigger asthma—precluded him from working in the filler room. Arsenault responded appropriately to that information from the grievant, by withdrawing that work order to the grievant. Thus, the grievant had just seen that by giving a specific medical explanation of why he could not perform a task, Arsenault would withdraw the problematic work assignment. In stark contrast, the grievant gave Arsenault no comparable, specific medical reason why he could not clean under the accumulation table. This strongly suggests that the grievant did not genuinely perceive any

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[5] The Union in its brief did not press its claim that the disciplinary action was somehow tainted by the fact that the grievant's father and Supervisor Arsenault were involved in a business relationship gone bad.

safety/health risk regarding the second directive. He knew that he could cite with specificity a medical reason as the basis for declining to follow a directive, and he did so without discipline regarding the ozone. His failure to act in a comparable manner regarding the order to clean under the accumulation table is telling evidence that he did not sincerely have a comparable medical concern about the latter directive.

The Union argues that the grievant did at least imply that there was some medical problem causing him to not follow Arsenault's directive. The Union cites the grievant's testimony that he told Arsenault, "You know, Mike, . . . my crawling days are over; it's hard for me to crawl into bed just as well as it is hard for me to crawl out of bed." The Union suggests that Arsenault should have inquired further, if he needed clarification of what medical condition had caused the grievant's "crawling days" to be over.

However, assuming that this comment was made, it was at best so ambiguous as to not put Arsenault on any reasonable notice that a medical issue might be causing the grievant to decline to crawl under the accumulation table to clean out scrap bottles. That comment could easily be interpreted as meaning nothing more than, "I'm a grown man, I don't crawl around for anybody." Again, the grievant had just told Arsenault in clear, specific terms of a medical condition, his asthma, which made him unable to work in the filler room where ozone levels could be higher than normal. In sharp contrast, the grievant's vague and ambiguous reference to his crawling days being over did not provide to Arsenault a reasonable basis to conclude that the grievant was medically precluded from getting down on his hands and knees to clean under the accumulation table.

The Union further argues that it was the grievant's desire to keep confidential his hepatitis C, which caused him to not provide more specific information to Arsenault. The Union

suggests that the grievant was concerned that it would be embarrassing to have it widely known on the shop floor that he had contracted hepatitis. Thus, the Union suggests, the grievant limited his comment to the somewhat ambiguous comment, "My crawling days are over," and so forth.

This argument is not persuasive. The grievant testified that he already *had* told Head Supervisor Wiencek of this ailment, with understanding that Wiencek would inform any other supervisors on a need-to-know basis. This testimony shows that the grievant was prepared to have supervisors know of his liver ailment, as needed, in the context of his work. Presumably, when faced with termination for being insubordinate, he would similarly have told Arsenault of the medical condition [hepatitis C, liver ailment] that was forcing him to refuse to comply; if that in fact was the motivating factor. Indeed, he could have told Arsenault that in private, before this entire situation escalated. That he did not do so [while he did successfully raise the ozone issue regarding the other directive] seriously undermines the sincerity of his claim that his refusal was based upon a bona fide, reasonable health/safety concern pertaining to his liver condition.

Even more telling is the grievant's post-incident write-up of what happened, and then what was included in the grievance which was filed. The grievant wrote a statement himself, for his own use, on the night of February 6. Yet even in that document for his own use, he mentions nothing about any medical condition–liver, back, or anything else–impinging in any way upon his ability to comply with Arsenault's directive that he clean under the accumulation table [while he does mention his ozone sensitivity regarding the earlier order]. Even upon unrushed reflection, in the privacy of his home when he wrote for his own use what happened that night, he made no reference to any medical limitations or concerns relating to his liver condition.

Similarly, the grievance filed on February 6 contains nothing suggesting that there was any safety or health concern that caused the grievant to refuse to comply with Arsenault's directive that the grievant clean out the scrap bottle(s) from under the accumulation machine. With his job on the line, the grievant would have informed his Union representative and management of his liver condition at least by the time of filing his grievance, if that in fact had been a factor in his failing to comply with Arsenault's directive. His failure to make any reference to his liver condition convincingly shows that this was not a concern that factored into his non-compliance with the work directive.

Furthermore, the medical limitation regarding his back—cited by the Union at the step 2 grievance meeting—only pertained to lifting above shoulder height. There is no evidence it would have limited his ability to safely clean a few bottles out from under a table. It is interesting, though, that the grievant had given the Company written doctor's instructions about no lifting above shoulder height. One might think that if the grievant's liver condition precluded stooping or bending down, for example to clean underneath tables/machinery, the grievant would have provided similar documentation to the Company regarding that serious medical condition. That he did so as to his back condition, but not as to his liver condition, is additional evidence that the liver condition was not a limiting factor regarding occasional stooping and crawling in his work.

Indeed, part of his job is to clean up in his own work area. That would entail comparable clean-up under machines, tables, and so forth. Thus, the order that Arsenault gave on February 5 was consistent with duties routinely given to grievant. If the grievant were truly limited in his medical capacity to perform such work as was routinely assigned to him, he would have presented medical documentation to the Company, placing limits on work of that type.

In sum, the Union has failed to prove that the grievant's repeated refusals to follow Arsenault's clear order were motivated by a sincerely held, reasonable health/safety concern.

The Union's second claim is that the grievant reasonably believed that he would have been subjected to undue humiliation or embarrassment, or even risk of sexual assault, were he to have bent over to clean under the accumulation table. This defense, as well, is unpersuasive. The banter before the grievant's act of insubordination quite obviously involved a bunch of guys—the grievant's co-workers from within the bargaining unit—simply ribbing the new supervisor, and the new supervisor [unwisely] trying to play along to show he was still a good guy. The grievant knew that none of this was serious; he even observed Arsenault play act that he was calling up right then and there, on his radio, to his supposed sexual partner to set up a sexual encounter. There was not in that ribbing the slightest, serious implication that Arsenault in fact had homosexual inclinations, or the inclination to act on them in any way on the shop room floor. There was absolutely no reasonable basis for the grievant to believe that he would genuinely have been at risk of sexual assault by Arsenault, had the grievant bent over to clean as directed. Nor was there any reasonable basis to believe that Arsenault in fact had any prurient interest in checking out the grievant's behind by having him bend over to clean under the accumulation table.

The Union also raises a Weingarten issue, contending that the grievant asked for but was not provided with a Union representative during an investigatory interview.

That argument, however, mis-characterizes the purpose for which Arsenault brought the grievant to the conference room. This was not done to carry out an investigatory interview. On the contrary, from Arsenault's perspective, there was nothing to investigate, since Arsenault had been a direct

participant in all the events in question. Rather, Arsenault brought the grievant to the conference room to write up his notification of suspension, pending further investigation. In addition, Arsenault hoped that by recruiting the assistance of a second, more senior supervisor, they might be able to persuade the grievant to change his mind and comply with the work directive. In sum, the meeting in the conference room was not investigatory in nature, and Weingarten rights did not apply.

That leaves one remaining issue for discussion, that being the level of discipline imposed. The Company asserts that Article 32 of the labor agreement clearly and unambiguously states that when an employee commits an act of insubordination, that by definition constitutes just cause for termination. Accordingly, the Company concludes, the arbitrator lacks the authority to reduce a termination to a lesser level of discipline, once the offense of insubordination has been proven.

Article 32 reads as follows:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to the following: . . .
>
> 2. Failure to comply with Company rules; . . .
>
> 8. Insubordination;
>
> 9. Sleeping on duty;
>
> 10. Failure to use prescribed safety appliances or observe safety rules . . .
>
> It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a warning may or may not also be appropriate prior to discharge with regard to items 2 and 16 (depending on the rule violated or the practice not complied with).

That language may well establish that in clear, straightforward cases of insubordination, without mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination. However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination. On the contrary, where significant, mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified. This more complex fact situation must be considered under the general, just cause standard set forth in article 32, giving due weight to the fact that the parties have agreed that a pure case of insubordination, without mitigating considerations, would provide just cause to terminate.

A troubling aspect of the present case is that Supervisor Arsenault, even in the Company's own judgment, acted inappropriately when he joined in and took part in the rather tasteless joking about how Arsenault had provided sexual favors to the plant manager in order to get promoted. The problem with Arsenault's behavior was that the supervisor's action blurred the line between the supervisor and the workers; his improper fraternizing with the workers created the very real possibility that they would lose sight, at least at that moment in time, of the supervisory relationship that he now had with them.

That appears to be exactly what happened here. Until recently, Arsenault had been a co-worker of the grievant, not his supervisor. Then, at the start of the whole unfortunate incident of February 5, 2000, Arsenault again was acting like he was one of the guys, a peer rather than a supervisor. When Arsenault then switched back into his supervisor's role by giving out work directives, the grievant, unfortunately, continued to respond to Arsenault as if he were just another one of the guys, now trying to tell the grievant what to do.

None of this means that the grievant was faultless through the events in question. He should have been able to figure out that Arsenault had shifted gears and was now acting in his supervisory capacity; he should have promptly followed the directives of the person he knew to be his supervisor. Furthermore, and very important to the outcome of this case, Arsenault first alone and then with the assistance of LaPlante gave the grievant clear warning of the fact that his behavior had become insubordinate, and gave the grievant numerous opportunities over an extended period of time to abandon his initial refusal, and to perform the work as directed.

In sum, in looking at this situation as a whole, it is clear that the supervisor's improper fraternizing with production workers, including the grievant, created an environment where one of the employees might think, at least initially, that Arsenault was not acting in his supervisory capacity, but rather only as one of the guys joking around on the shop floor. Given that confusing environment which Arsenault's actions created, at the very commencement of the February 5 incident, it was unjust for the Company to terminate the grievant for his insubordinate behavior which immediately followed. However, given that the grievant's insubordinate behavior then extended over a lengthy period of time, even after repeated warnings from two supervisors, a two week suspension without pay would have been justified.

APPENDIX E

AGREEMENT

Between

POLAND SPRING CORPORATION

And

UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO-CLC
LOCAL 1445

Effective: January 1, 1997

Expires: December 31, 2001

ARTICLE 32: DISCIPLINE AND DISCHARGE

Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:

1. Destruction or removal of Company or fellow employee's property;

2. Failure to comply with written Company rules;

3. Reporting for duty under the influence of intoxicants or drugs;

4. Bringing intoxicants or drugs into the operation;

5. Smoking other than in designated areas;

6. Reading on duty except when required;

7. Giving or taking a bribe of any nature as an inducement to obtaining work or retaining a position;

8. Insubordination;

9. Sleeping on duty;

10. Failure to use prescribed safety appliances or observe safety rules;

11. Generally substandard work;

12. Loafing on the job;

13. Carelessness or negligence in the use or operation of Company equipment;

14. Excessive tardiness or absence from work without just cause or failure to obtain approval from the supervisor in advance of absence from work;

15. Walking off the job or leaving the job without proper authorization during work hours;

16. Failure to comply with specified Company operating practices;

17. Lack of cleanliness or personal hygiene;

18. Fighting or physical contact;

19. Falsification of Company documents, including personnel, time and reimbursement records;

20. Lying or willful misrepresentation of the facts: and

21. Committing sexual or other prohibited harassment

It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a warning may or may not also be appropriate prior to discharge with regard to items 2 and 16 (depending on the rule violated or the practice not complied with).

It is agreed that after twelve (12) months from the date of issuance, warnings will be eliminated from the employee's record for disciplinary purposes.

ARTICLE 33: GRIEVANCES AND ARBITRATION

Section 1. Grievance Procedure:

Should differences arise between the Employer and an employee or between the Employer and the Union as to the meaning or application of the provisions of the Agreement only, there shall be no suspension or stoppage of work. The employee or the Union shall present all grievances within three (3) working days from the occurrence, situation, condition or action or Management giving rise to the grievance or the grievance shall be considered waived.

Step 1: The employee shall discuss the grievance with the Supervisor involved. The supervisor will attempt to settle the grievance within two (2) working days after the discussion with the aggrieved employee. If not settled at Step 1, the Union may take the grievance to Step 2.

Step 2: The Steward shall submit the grievance in writing to the Department Head within three (3) working days following notification of the Employer's first step decision.

The Department Head, or his/her designee, shall attempt to resolve the matter. If the matter is not resolved within three (3) working days, the written grievance and the Company's answer shall be sent to the Union. The grievance then may be submitted to Step 3. The written grievance shall identify:

(a) the facts giving rise to the grievance;

(b) the Article and Section of the Agreement the Union alleges that the employer violated; and

(c) the relief requested and shall be signed by the employee or the Union.

Step 3: The Union shall notify the General Manager within five (5) working days after the receipt of the Department Head's second step decision of its intent to pursue the grievance. The General Manager and/or his or her designee, will meet with the Union's Business Representative or his/her designee to resolve the matter. In the event a settlement is not reached within five (5) working days, a dispute shall exist, and the resolution of the dispute shall be subject to arbitration. Grievances involving the discharge of an employee may begin at Step 3.

The parties agree to follow each of the foregoing steps in the processing of grievances unless both parties agree to skip one (1) or more steps; and that if, at any step, the Employer fails to give its answer within the time limit set forth, the Union may appeal the grievance to the next step.

If at any step, the employee/Union fails to require the grievance to be submitted to the next step within five (5) working days following the expiration of the time limit as set forth in the step procedure, the grievances will be deemed by both parties to be settled.

A grievance that ensues during the period between the termination date of the contract and the effective date of a new contract will not be subject to arbitration unless

expressly agreed to by the Employer. The Employer and the Union may extend the time limit set forth in the grievance procedure by written mutual agreement. The party requesting the extension must do so in writing by certified mail.

Only a single grievance may be heard by the arbitrator at one time except by mutual agreement unless the issues are identical. The Union may refuse to process, abandon or settle a grievance irrespective of the grievant's wishes.

The rights afforded employees and the Union under this provision are also available to the Employer. The Employer, if it chooses, can process its grievance through the grievance and arbitration procedure.

Section 2. Arbitration:

A dispute shall be deemed settled unless a written notification requesting arbitration is postmarked by the Union within five (5) working days of the Union's receipt of the Employer's third step decision under the grievance procedure. The written notification must state the issue to be arbitrated. If the Union submits a written request, the Employer and the Union shall attempt to agree upon a procedure that is mutually agreeable where they might attempt to resolve the issue, or a neutral person whom they shall designate as the arbitrator. If they are unable to agree upon the selection of such an arbitrator, they shall request a list from the A.A.A. Service

Employees including Union Stewards, representatives and committeemen requested by the Union to attend a hearing during work hours shall not be paid for time lost.

The Employer has the right to insist that the grievant be present during the hearing.

Any arbitrator selected under the provisions of this Article shall have the authority to render a decision which shall be final and binding on the parties to the extent provided by law. Such a decision must be rendered within thirty (30) days of

the hearing, unless otherwise agreed to by both the Employer and the Union. The arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement. Nor shall the arbitrator decide an issue in favor of the Union which grants a right which the Union was unable to obtain in past collective bargaining negotiations. The professional fees of the arbitrator plus any other related expenses over and above those fees shall be borne equally by both the Employer and the Union. An arbitrator's remedy cannot extend beyond the termination date of the Agreement.

(2)

Supreme Court, U.S.
FILED
JUL 2 8 2003
OFFICE OF THE CLERK

No. 02-1722

IN THE

Supreme Court of the United States

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 1445,

Petitioners,

v.

POLAND SPRING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court grant certiorari to review the determination by the United States Court of Appeals for the First Circuit that an arbitration award was properly vacated because it ignored the plain language of the applicable contract?

STATEMENT PURSUANT TO RULE 29.6

Respondent's parent corporations and the publicly held companies holding 10% or more of its stock are:

Nestlé Waters North America Inc.

Perrier Vittel S.A.

Nestlé S.A.

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STATEMENT OF THE CASE

The Parties

At all times relevant to this matter, Respondent, Poland Spring Corporation ("Poland Spring" or the "Company"), bottled and distributed spring water at its facility in Poland Spring, Maine. (Pet. App., 1a). Petitioner, United Food and Commercial Workers International Union, AFL-CIO-CLC, Local 1445 (the "Union"), was the exclusive bargaining agent for certain classifications of the Company's employees at that facility. (Pet. App., 26a). The parties entered into a collective bargaining agreement (the "Contract") that, by its terms, governed their relationship from January 1, 1997 to December 31, 2001.[1] (Pet. App., 49a-54a). Leo Beaupre (the "Grievant") was one of the employees represented by the Union. When Mr. Beaupre was discharged by Poland Spring, the Union submitted his resulting grievance to arbitration before Arbitrator Philip Dunn ("Arbitrator Dunn" or the "Arbitrator"). (Pet. App., 3a-4a, 32a).

The Grievant's Discharge

The Grievant was suspended and ultimately terminated from his position as a palletizer operator as a result of an incident that occurred on the night shift that began on February 5, 2000 and ended early in the morning on February 6. A palletizer is a machine that loads case lots of bottles onto pallets and wraps the full pallets in plastic for shipping. The Grievant's job in operating that equipment included

---

1. The Contract in effect during the events at issue in this matter expired by its terms on December 31, 2001. A new agreement has since been negotiated by the parties.

placing empty pallets on the machine and removing loaded pallets from it. (Pet. App., 1a-2a). The Arbitrator found that all bargaining unit employees of Poland Spring, including the Grievant, share responsibility for keeping the plant clean. For the Grievant, that responsibility included cleaning scrap bottles or other litter from under his machine, which was elevated on legs above the floor. (Pet. App., 33a).

During the night shift beginning February 5, the Grievant's assigned production line was temporarily down. The Grievant was initially reassigned by his supervisor, Mike Arsenault, to help clean the filler room. When the Grievant explained that his medical condition prevented him from working in that room, Mr. Arsenault withdrew the assignment. Instead, Mr. Arsenault directed the Grievant to clean bottles out from under a raised platform called an accumulation table. (Pet. App., 34a-35a).

The Arbitrator found that the Grievant refused to perform the new assignment. Mr. Arsenault repeated his instruction to clean under the accumulation table, and the Grievant again refused. After the second refusal, Mr. Arsenault warned the Grievant that his non-compliance would constitute an act of insubordination that could result in termination. When he again refused to perform the work assignment, Mr. Arsenault directed the Grievant to accompany him to a conference room. (Pet. App., 36a).

The Grievant testified that, on the way to the conference room, he asked Mr. Arsenault "if he was the man that was going to take the grievant's job over a bottle of water, and if he did, would that make him feel like a man." As a result of that comment, the Arbitrator found: "Certainly, then, the grievant at least by that point understood that he could face

termination for failing to comply with Arsenault's directive." Nevertheless, the Grievant continued to refuse to perform the assignment. (Pet. App., 36a-37a).

Mr. Arsenault and another supervisor met with the Grievant in the conference room, and the Grievant was warned that, if he continued to refuse to perform the task assigned to him, he could be suspended pending investigation of grounds for termination. The Grievant continued to refuse to perform the assignment and, as he had been warned, was suspended and sent home. Ultimately, the suspension was converted to a termination of employment. (Pet. App., 37a-39a).

The Contract Between the Parties

The Contract specifically reserves to Poland Spring the right to terminate its employees for just cause. Article 9 is entitled "Management Rights" and provides in relevant part:

> Management of the operations and the direction of the workforce, including but not limited to . . . the right to . . . discharge for just cause . . . shall be solely and exclusively vested in the Company subject only to limitations as are expressly provided for in this Agreement. . . .

(Resp. App., 2a).

Article 32 is entitled "Discipline and Discharge" and sets forth the parties' agreement that insubordination constitutes just cause for termination. The language in that Article states that a number of categories of employee misconduct may

warrant a lower level of discipline prior to discharge. Insubordination, however, is not such an offense. Article 32 provides in relevant part:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:
>
> . . .
>
> 8. Insubordination;
>
> . . .
>
> It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a warning may or may not also be appropriate prior to discharge with regard to items 2 and 16. . . .

(Pet. App., 50a-51a).

Finally, in Article 33, "Grievances and Arbitration," the parties agreed to submit differences as to the Contract's meaning or application to a grievance procedure ultimately leading to arbitration. As part of that agreement, however, they explicitly limited an arbitrator's authority. Article 33 provides in relevant part:

> . . . . The arbitrator shall have no power to alter or modify any of the terms of this Agreement or to impose on any party a limitation or obligation not explicitly provided for in this Agreement. . . .

(Pet. App., 54a).

The Opinion and Award

After considering all of the evidence submitted by both Poland Spring and the Union at a hearing held on December 19, 2000, Arbitrator Dunn issued an award (the "Award") in which he found that the Grievant repeatedly refused to perform a task that was within his job responsibilities. He also found that the Grievant was aware that he risked termination by failing to comply with his supervisor's instructions. The Arbitrator concluded that "[t]here is little doubt in this case that absent some persuasive affirmative defense, the grievant was guilty of the offense of insubordination." (Pet. App., 40a-41a).

The Arbitrator then considered and rejected the Union's two proffered affirmative defenses. First, the Union argued that the Grievant's health or safety would have been compromised if he had complied with Mr. Arsenault's directive to clean under the accumulation table. The Arbitrator rejected that defense, finding that the Union failed to prove that the Grievant's refusal was motivated by a sincerely held, reasonable health or safety concern. (Pet. App., 41a-45a).

Arbitrator Dunn also rejected the Union's second defense that the Grievant reasonably believed he would have been subjected to humiliation, embarrassment, or sexual assault if he had bent over to clean under the accumulation table. That defense was based on banter of a sexual nature that occurred earlier in the evening between the Grievant's co-workers and his supervisor. Arbitrator Dunn described the interaction as "a bunch of guys . . . simply ribbing the new supervisor, and the new supervisor (unwisely) trying to play along to show he was still a good guy." The Arbitrator found

that the Grievant knew that the banter was not serious and that "[t]here was not in that ribbing the slightest, serious implication that Arsenault in fact had any homosexual inclinations, or the inclination to act on them in any way on the shop floor." As a result, Arbitrator Dunn concluded that the Grievant had "no reasonable basis" for believing that he was at risk of assault if he complied with his supervisor's directions or for believing that his supervisor "had any prurient interest in checking out the grievant's behind by having him bend over to clean under the accumulation table." (Pet. App., 45a).

Having rejected the Union's affirmative defenses for the Grievant's insubordination, the Arbitrator declared: "That leaves one remaining issue for discussion, that being the level of discipline imposed." On that issue, the Arbitrator acknowledged Poland Spring's argument:

> The Company asserts that Article 32 of the labor agreement clearly and unambiguously states that when an employee commits an act of insubordination, that by definition constitutes just cause for termination. Accordingly, the Company concludes, the arbitrator lacks the authority to reduce a termination to a lesser level of discipline, once the offense of insubordination has been proven.

(Pet. App., 46a).

After reviewing Article 32 of the Contract, however, Arbitrator Dunn rejected Poland Spring's contention:

> [Article 32] may well establish that in clear, straight-forward cases of insubordination, without

> mitigating considerations, the parties by agreement have established the per se rule that there is just cause for termination. However, the language of Article 32 does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination.

(Pet. App., 46a-47a).

The Arbitrator then explained his view that "where significant, mitigating considerations are present, the culpability of the employee may be diminished, and summary termination may no longer be justified." Under that standard, he considered Mr. Arsenault's "improper fraternizing with production workers, including the grievant," finding that it "created an environment where one of the employees might think, at least initially, that Arsenault was not acting in his supervisory capacity." As a result, the Arbitrator concluded:

> Given that confusing environment which Arsenault's actions created, at the very commencement of the February 5 incident, it was unjust for the Company to terminate the grievant for his insubordinate behavior which immediately followed. However, given that the grievant's insubordinate behavior then extended over a lengthy period of time, even after repeated warnings from two supervisors, a two week suspension without pay would have been justified.

(Pet. App., 47a-48a).

The District Court Action

Arguing that Arbitrator Dunn exceeded his contractual authority in purporting to reinstate the Grievant, Poland Spring filed an action in the district court seeking to vacate his Award. The Union counterclaimed seeking enforcement. Both parties moved for summary judgment, and the District Court found in Poland Spring's favor. (Pet. App., 26a-28a).

The district court found that, under the Contract, "insubordination is explicitly made just cause for discharge" and that, "[u]nlike some other bases for discharge, there is no requirement of prior warning in cases of insubordination." Holding that "the arbitrator found explicitly that [the Grievant] was guilty of insubordination," the court concluded that "the arbitrator exceeded his powers in ordering the reinstatement of the insubordinate employee." (Pet. App., 26a-28a).

Appeal to the First Circuit

Petitioner appealed the district court's order granting summary judgment to Poland Spring. The panel majority agreed with the Union that "'insubordination' is not defined in the contract nor is it self-defining." As a result, the Arbitrator "could permissibly have read the contract to mean that some acts of disobedience constitute 'insubordination within the meaning of the contract and that other, less severe acts – although literally disobedience – do not." (Pet. App., 16a-17a). However, the panel majority also agreed with the court below, finding that the Arbitrator had in this case deemed the Grievant guilty of insubordination under the Contract. (Pet. App., 14a).

Having done so, the court explained, the Arbitrator was "barred from further inquiry because such additional probing constituted ignoring the plain language of the contract." Although the meaning of the term "insubordination" under the Contract is ambiguous and subject to interpretation, the court found that the plain language of the Contract provides that insubordination, once found, is always just cause for termination. (Pet. App., 10a-12a). As a result, because the Arbitrator had found insubordination, the Award ordering reinstatement of the insubordinate Grievant was unenforceable. (Pet. App., 15a).

Petitioner's motions for rehearing by the First Circuit panel and for rehearing en banc were denied. (Pet. App., 29a).

REASONS FOR DENYING THE PETITION

I. The First Circuit's Decision Vacating an Award that Disregards the Plain Language of the Contract does not Contradict any Decision of this Court Limiting Judicial Review of Arbitration Awards.

As Petitioner emphasizes, under this Court's holding in such cases as *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), and *United Steelworkers of America v. Enterprise Wheel & Car*, 363 U.S. 593, 597 (1960), judicial review of an arbitration award is narrow and deferential to the arbitrator. A court may not reconsider the merits of an award and may not second-guess an arbitrator's findings of fact or interpretation of a contract. *Misco*, 484 U.S. at 36. However, even under that deferential standard of review, an arbitrator's discretion in settling labor disputes is not altogether unlimited. Instead, an arbitrator's authority "is confined to interpretation and application of

the collective bargaining agreement." *Enterprise Wheel & Car*, 363 U.S. at 597. As a result, this Court has repeatedly emphasized that an arbitrator "may not ignore the plain language of the contract," and an arbitration award "cannot simply reflect the arbitrator's own notions of industrial justice." *E.g.*, *Misco*, 484 U.S. at 38; *E. Assoc. Coal Corp. v. UMW, Dist. 17*, 531 U.S. 57, 62 (2000); *Enter. Wheel & Car*, 363 U.S. at 597. An "award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Enter. Wheel & Car*, 363 U.S. at 597. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.*

Petitioner argues that the First Circuit contradicts this Court's decisions limiting review of an arbitration award by itself reviewing the language of the Contract to determine whether that language permitted Arbitrator Dunn's interpretation. In making that argument, Petitioner suggests that only an arbitrator, and not a court, is allowed to analyze contract language. That argument is illogical. In order to determine whether an award "ignore[s] the plain language of the contract" or "draws its essence from the collective bargaining agreement," the First Circuit had to review and analyze the Contract language at issue. Although a court may not vacate an award simply because it disagrees with an arbitrator's interpretation, it may not enforce an award that deviates from the plain language of the applicable contract. *Enter. Wheel & Car*, 363 U.S. at 597. Thus, this Court's decisions did not prohibit, but in fact required, the First Circuit to review the Contract language at issue and determine whether it permitted the Arbitrator's interpretation.

Petitioner also makes the illogical argument that the First Circuit's approach to reviewing an arbitration award

exceeds the court's authority to determine only whether an award rests on the arbitrator's interpretation of a contract. In the approach articulated by the First Circuit, the court first determines whether the language at issue is fairly susceptible to differing meanings. Where the language is not susceptible to differing meanings, the court holds that the arbitrator lacks discretion to interpret it. That approach is simply another way of articulating this Court's prohibition against enforcing an award that deviates from the plain language of an agreement. As a result, decisions stating and applying the First Circuit's approach to reviewing arbitration awards do not conflict with any of the decisions of this Court on the subject.

Furthermore, Petitioner confuses the issues and misrepresents the opinion below in its efforts to demonstrate that the First Circuit overstepped its bounds in reviewing the Award in the instant case. Petitioner argues that the First Circuit engaged in impermissible contract interpretation and infringed on the Arbitrator's exclusive authority when it held that the plain language of the Contract did not allow the Arbitrator to engage in further scrutiny once he found that the Grievant was guilty of insubordination. In support of that argument, Petitioner asserts that the First Circuit's own opinion demonstrates that the language at issue does not have the clear and plain meaning assigned to it by that court in overturning the Arbitrator's Award. In making that assertion, however, Petitioner confuses the court's discussion concerning the definition of "insubordination" under the Contract with the court's holding regarding the appropriate discipline for that offense.

Petitioner correctly notes that the First Circuit held that the plain language of the Contract provides that

insubordination is just cause for termination, prohibiting the Arbitrator from relying on mitigating circumstances to substitute a lesser degree of discipline once he found that the Grievant was insubordinate. Petitioner incorrectly argues, however, that the majority opinion "recognized . . . that 'minor' or 'trivial' instances of insubordination would not constitute 'just cause' for discharge." To the contrary, the majority found that, while the plain language of the Contract establishes that insubordination is always just cause for termination, "the term insubordination is not defined in the agreement and is obviously susceptible to multiple interpretations." (Pet. App., 14a). As a result, "the arbitrator could permissibly have read the contract to mean that some acts of disobedience constitute 'insubordination' within the meaning of the contract and that other, less severe acts – although literally disobedience – do not." (Pet. App., 17a). Simply stated, under the First Circuit's analysis, it was up to the Arbitrator to determine whether Grievant's conduct constituted insubordination or was instead one of those "minor or trivial" acts of disobedience that did not rise to the level of insubordination. But once he found that it was insubordination, the Contract dictated that it was just cause for termination. There is no conflict in the First Circuit's holding that the term insubordination is ambiguous and subject to the Arbitrator's interpretation while the Contract provision concerning the appropriate discipline for insubordination is not. Nor, as Petitioner claims, does the ambiguity in one provision undermine the plain meaning of the other.

Likewise, Petitioner misstates First Circuit case law by arguing that the Circuit mandates literal interpretation of contract language and prohibits an arbitrator from finding implied terms. Petitioner has not cited a single instance in

which the First Circuit has so held. Moreover, the First Circuit does not apply a purely literal approach to reviewing the language of an agreement. Instead, the language of an agreement is "taken in context and with due regard for the surrounding circumstances." *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 845 (1st Cir. 1997).[2]

Finally, it is Petitioner, and not the First Circuit, who advocates an approach that is contrary to this Court's precedent. Petitioner seeks to prohibit courts from conducting any analysis of the relevant contract language during the process of reviewing arbitration awards. Under the Petitioner's approach, an arbitrator would merely have to discuss the language of a contract in his or her award to survive judicial review, even if his or her ultimate decision contradicted the intention of the parties as clearly expressed in the agreement. This Court's precedent supports no such outcome. Instead, the Court holds that an arbitrator's authority is limited to interpreting and applying the collective bargaining agreement. *E.g.*, *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509 (2001). While an

2. Petitioner cannot argue that the First Circuit impermissibly prohibited the Arbitrator from finding an implied term in the present case. "Inferring an implied condition must be distinguished from creating one." *Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 186 (7th Cir. 1985). As demonstrated more fully below, when he reinstated the Grievant, Arbitrator Dunn created a new limitation on the Company's right to discharge its employees that contradicts the Agreement's express language. Moreover, unlike the contract at issue in *Ethyl*, the Contract in the present case prohibited the Arbitrator from imposing on the Company any limitations not *expressly* provided in the Contract. Thus, although the First Circuit does not generally prohibit arbitrators from finding terms that are merely implied in a contract, the Contract at issue here precluded Arbitrator Dunn from finding any implied provisions.

arbitrator has considerable discretion in carrying out that function, this Court has long recognized that it is the courts' responsibility to ensure that he does not "ignore the plain language of the Contract" or "dispense his own brand of industrial justice." *E.g.*, *Misco*, 484 U.S. at 38; *United Steelworkers of Am. v. Enter. Wheel & Car*, 363 U.S. 593, 597 (1960). The First Circuit's approach in this and similar cases merely carries out that mandate.

II. The First Circuit's Interpretation of the Award and Application of this Court's Properly Stated Rules Concerning Judicial Review do not Warrant Certiorari.

Petitioner argues that certiorari is appropriate in this case because the First Circuit erred when it held that the Arbitrator ignored the plain language of the Contract. That holding was based on the court's factual determination that the Arbitrator found the Grievant insubordinate yet mitigated the discipline for that conduct, disagreeing with the Union's argument that the Arbitrator did not find insubordination. Having made that factual determination, the court then applied this Court's rule requiring arbitration awards to draw their essence from the Contract. Even if the First Circuit's holding was incorrect, erroneous factual findings and misapplication of a properly stated rule of law are rarely grounds for a writ of certiorari. Sup. Ct. Rule 10. Moreover, nothing about this case provides an exception to the rule. To the contrary, the Award demonstrates that both the First Circuit and the district court below were correct in concluding that the Award fails to draw its essence from the Contract.

In an effort to link the Arbitrator's decision to the text of the collective bargaining agreement, Petitioner notes the

Arbitrator's reference to the language of Article 32. However, an arbitrator cannot shield from judicial correction an impermissible disposition of a grievance "simply by making the right noises – noises of contract interpretation." *Ethyl Corp. v. United Steel Workers of Am.*, 768 F.2d 180, 187 (7th Cir. 1985). The decision at issue here qualifies as such an impermissible disposition because it altogether departs from the essence of the Contract.

An arbitration award fails to draw its essence from an agreement when it: (1) conflicts with express terms of the agreement; (2) imposes additional requirements not expressly provided in the agreement; (3) is without rational support or cannot be rationally derived from the terms of the agreement; or (4) is based on general considerations of fairness and equity instead of the precise terms of the agreement. *Wyandot v. Local 227, UFCW*, 205 F.3d 922, 292 (6th Cir. 2000). The Award in this case deviates from the essence of the Contract in each of those four ways.

Upon finding that the Grievant had been insubordinate, the Arbitrator substituted his own brand of industrial justice for the Contract's agreed-upon discipline for that conduct. He did so by creating a mitigating circumstances exception to the parties' agreement that insubordination constitutes just cause for termination. Recognizing that Article 32 allows termination for insubordination, the Arbitrator noted that it "does not state that even in the presence of mitigating circumstances, insubordination still will necessarily provide the Company with just cause for termination." (Pet. App., 47a). The Arbitrator was, of course, correct. Article 32 does not include that language. Nor does it state that "insubordination will be just cause for termination in the *absence* of mitigating circumstances." It provides that

"just cause for discharge shall include . . . insubordination" – period. The Arbitrator in effect added "in the absence of mitigating circumstances" to that provision. Holding that when mitigating circumstances are present, "the culpability of the employee may be diminished, and summary termination may no longer be justified," he concluded that "it was unjust for the Company to terminate the grievant for his insubordinate behavior." (Pet. App., 47a-48a).

That conclusion by the Arbitrator conflicts with the express terms of the Contract. Under Article 32, insubordination is *per se* just cause for termination, giving the Company the absolute right to discharge the Grievant for his insubordinate behavior:

> Discipline and discharge shall only occur for just cause. The parties agree that just cause for discharge shall include, but not be limited to, the following:
>
> . . .
>
> 8. Insubordination;
>
> . . .

(Pet. App., 50a-51a). Although the parties agreed in Article 32 that some categories of employee misconduct may warrant a lower level of discipline prior to discharge, they expressly excluded insubordination (item 8) from that list:

> It is anticipated that prior to discharge, employees would first be given a warning with regard to items 10, 11, 12, 14, and 17, and that a

> warning may or may not also be appropriate prior to discharge with regard to items 2 and 16. . . .

(Pet. App., 51a). Thus, by concluding that the Grievant's insubordination was not just cause for his termination, the Award conflicts with the express terms of the Contract. Accordingly, it fails to draw its essence from the Contract.

Likewise, the Award imposes additional requirements not expressly provided in the Contract. To discharge an employee, the Arbitrator required "insubordination in the absence of mitigating circumstances." The Contract, however, requires only "insubordination," and nothing else. Thus, the Arbitrator exceeded his authority by imposing an additional limitation on Poland Spring's right to terminate its employees, and the Award does not draw its essence from the Contract.

That additional limitation also conflicts with the express terms of the Contract. Under Article 33 of the Contract, Arbitrator Dunn had no power to alter or modify the Contract's terms or to impose any limitation or obligation not *explicitly* provided for in the Contract. (Pet. App., 54a). Likewise, under Article 9, Poland Spring's rights were limited only as *expressly* provided in the Contract. (Resp. App., 2a). Thus, by imposing a mitigating circumstances limitation on the Company's right to discharge its employees for insubordination that is not explicitly or expressly provided in the Contract, the Award conflicted with the express terms of the Contract.

Furthermore, the Award deviates from the essence of the Contract because the Arbitrator's justification for creating a mitigating circumstances exception – that the Contract does not prohibit one – is illogical, "unfounded in reason and fact,"

and "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *See Bettencourt v. Boston Edison Co.*, 560 F.2d 1045, 1050 (1st Cir. 1977) (quoting *Safeway Stores v. Am. Bakery & Confectionery Workers*, 390 F.2d 79, 82 (5th Cir. 1968)). The Contract expressly provides that insubordination constitutes just cause for termination. If the parties intended mitigating circumstances to affect whether insubordination constitutes just cause, they would have included that agreement in the Contract. Under the Arbitrator's reasoning in this case, an arbitrator could read into a collective bargaining agreement any term that is not expressly precluded, making all contracts, regardless of how detailed or lengthy, ambiguous and subject to interpretations that the parties never even imagined, let alone agreed upon. For example, under Arbitrator Dunn's logic, it would be impossible for the parties to draft language that allows the Company absolute discretion to discharge insubordinate employees, even if that was their intent. If they chose language providing that an employee can be discharged for insubordination "even in the presence of mitigating circumstances," an arbitrator could still overturn a discharge by noting that the agreement does not allow discharge when there are "*very serious* mitigating circumstances." Accordingly, the Award fails to draw its essence from the Contract because it is completely without rational support and cannot be rationally derived from the terms of the Contract.

Finally, the language of the Award demonstrates that it is based on general considerations of fairness and equity instead of the precise terms of the Contract. The Arbitrator did not rely on the language of the Contract to support his conclusion that the Grievant's insubordination was not just

cause for discharge in this case. To the contrary, he noted the absence of any language authorizing him to consider mitigating circumstances. Instead of depending on the language of the Contract, he weighed the equities, holding that when mitigating circumstances are present, "the culpability of the employee may be diminished, and summary termination may no longer be justified." (Pet. App., 47a). Ultimately, he concluded that "it was unjust for the Company to terminate the grievant for his insubordinate behavior." (Pet. App., 48a). Thus, in purporting to reinstate the Grievant, Arbitrator Dunn dispensed his own version of industrial justice instead of interpreting and applying the language of the Contract. As a result, the First Circuit did not err in finding that the Award fails to draw its essence from the Contract, and certiorari is not warranted in this case.

CONCLUSION

This case does not present compelling reasons for review on certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

AGREEMENT

between

POLAND SPRING CORPORATION

and

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC LOCAL 1445

Effective: January 1, 1997
Expires: December 31, 2001

Appendix

* * *

ARTICLE 9: MANAGEMENT RIGHTS

Management of the operations and the direction of the workforce, including but not limited to the establishment of operational, safety, health and sanitation rules, the right to hire, promote, transfer personnel and assign work, the right to demote, to discipline, suspend or discharge for just cause, the right to schedule hours and to require reasonable overtime work, the right to relieve employees from duty because of lack of work, and the right to decide the number and location of its operations, the extent to which the locations covered by this Agreement shall operate or be shut down, the right to subcontract out bargaining unit work, the work to be performed, the raw materials, the parts, tools or components to be incorporated therein, the schedule of production, the type of machines or equipment to be used, the methods and standards of quality and quantity of work to be performed, the selling price of products, the methods of selling and distributing products, the personnel required in supervisory, clerical and other positions not included in the bargaining unit, the source of an applicant for employment, and the methods, processes and means of production shall be solely and exclusively vested in the Company subject only to limitations as are expressly provided for in this Agreement. The parties agree that the Company has the right to establish work standards and to maintain the efficiency of employees.

It is also understood that nothing herein shall prevent the Company from transferring, closing out or selling out, in whole or in part, any of its operations, wherever the same

may be located, whenever, in its judgment, it deems such action to serve best its economic interests.

The Company, by not exercising rights reserved to it under the Management Rights clause or by exercising them in a particular way, shall not be deemed to have waived said rights or to have waived the right to exercise them in some other way not in conflict with the terms of this Agreement.

* * * *

Supreme Court, U.S.
FILED
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No. 02-1722

IN THE

Supreme Court of the United States

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL 1445,
Petitioner,

v.

POLAND SPRING CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

Poland Spring's Brief in Opposition confirms the essential point of our Petition for *Certiorari*, *viz.* that

> "Like the Ninth Circuit's decision in the *Garvey v. Baseball Players* litigation, the First Circuit decision in this case 'conflicts with [this Court's] cases limiting review of an arbitrator's award entered pursuant to an agreement between an employer and a labor organization.' *Major League Baseball Players' Ass'n v. Garvey*, 532 U.S. 504, 505 (2001), granting certiorari and reversing per curiam *Garvey v. Major League Baseball Players' Ass'n*, 243 F.3d 547 (9th Cir. 2000)(table).

* * *

> "[In this instance,] the First Circuit has proceeded in an equally plain disregard of [a] fundamental limit on the judicial review of labor arbitration awards by overturning a labor arbitration decision because the court disagrees with the arbitrator's view of the meaning of the labor contract and by resolving the merits of the parties' dispute on the basis of the court's own view of the contract's meaning." Pet. 7.

Poland Spring confirms this basic point by expressly admitting the following: First, in overturning the arbitration award in this case, the First Circuit "itself review[ed] the language of the Contract to determine whether that language permitted Arbitrator Dunn's interpretation." Br. in Opp. 10. Second, in so doing, the court below followed "the approach [to reviewing arbitration awards] articulated by the First Circuit, [by which] the court first determines whether the language at issue is fairly susceptible to differing meanings," and "[w]here[, in the court's view,] the language is not susceptible to differing meanings, the court holds that the arbitrator lacks discretion to interpret it." *Id.* at 11. Third, in undertaking this review, "the First Circuit does not apply a purely literal approach to reviewing the language of an agreement," but "[i]nstead, [interprets] the language of an agreement . . . 'taken in context and with due regard for the surrounding circumstances.'" *Id.* at 13, quoting *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 845 (1st Cir. 1997).

As Poland Spring sums up the First Circuit's approach, that court interprets the "language of [the] agreement"—read "with due regard for the surrounding circumstances"—to determine whether the arbitrator's "decision contradict[s] the intention of the parties." Br. in Opp. 13. And, according to Poland Spring, "the approach articulated by the First Circuit . . . is simply another way of articulating this Court's

prohibition against enforcing an award that deviates from the plain language of an agreement." *Id.* at 11.

But this Court has *never* charged a reviewing court with the task of policing an arbitration award for "deviations" from the contract language. To the contrary, from the *Steelworkers Trilogy* onward, this Court has consistently held that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Wheel Corp.*, 363 U.S. 593, 599 (1960).

Over the years, the Court has stated this holding in a variety of ways: "a court should not reject an award on the ground that the arbitrator misread the contract," *Paperworkers v. Misco*, 484 U.S. 29, 38 (1987); a court "must treat the arbitrator's award as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract's words," *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000); the "[c]ourts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision . . . misinterprets the parties' agreement," *Major League Baseball Players' Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

The governing legal rule could not be clearer. Contrary to the First Circuit's understanding, a reviewing court may *not* vacate an arbitration award on the grounds that the arbitrator's interpretation of the agreement "deviates" from what the court believes to be the proper interpretation of "the plain language of the applicable contract." Br. in Opp. 10.

In order to vindicate the integrity of the law governing the judicial review of labor arbitration awards, this Court should, as it did in *Major League Baseball Players v. Garvey*, *supra*, grant *certiorari* and reverse the decision of the court below.

Respectfully submitted,

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